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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

STATE OF CALIFORNIA, et al.,
Petitioners,

VS.

THE UNITED STATES OF AMERICA, et al.,
Respondents.

On Writ of Certiorari to the California Supreme Court

PETITION FOR WRIT OF CERTIORARI

JOHN K. VAN DE KAMP
Attorney General of the
State of California

R. H. CONNETT
Assistant Attorney General

RODERICK E. WALSTON*
CLIFFORD T. LEE
Deputy Attorneys General

California Attorney General's Office
350 McAllister Street, Room 6000
San Francisco, CA 94102
Tel.: (415) 557-3920

Attorneys for Petitioners
State of California, et al.

* *Counsel of Record*

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

QUESTIONS PRESENTED

1. Whether the United States' water rights in its lands arise solely under the United States Constitution—and hence are limited to reserved water rights under the Property Clause—or instead whether the United States also has riparian water rights held by ordinary landowners under state common law.

2. Whether Congress' land laws that encouraged settlement of the arid West by making water available to the settlers, particularly the Desert Land Act of 1877, terminated any common law riparian water rights held by the United States in its lands, assuming that the United States constitutionally has such rights.

3. Whether the United States can assert common law riparian water rights for wildlife purposes on national forest lands, in light of this Court's decision in *United States v. New Mexico*, 438 U.S. 696 (1978), holding that Congress did not intend to reserve water for such purposes.

PARTIES

The petitioners are the State of California and the State Water Resources Control Board. The respondents are the United States of America and the Sierra Club.

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OPINIONS BELOW

The decision of the California Supreme Court is reported at 44 Cal.3d 448 and 243 Cal. Rptr. 887, and is reprinted at Appendix 1-26. The decision of the California Court of Appeal is reported at 187 Cal.App.3d 863 and 232 Cal. Rptr. 208, and is reprinted at Appendix 28-42. The decision of the California Superior Court has not been officially reported, and is reprinted at Appendix 43- 51.

JURISDICTION

The decision of the California Supreme Court was filed and entered on February 18, 1988. A petition for rehearing was filed on February 29, 1988, and was denied on March 16, 1988. The California Supreme Court decision is now final. This Court has jurisdiction to review the decision by writ of certiorari under 28 U.S.C. § 1257(3).

APPLICABLE FEDERAL LAWS

The Property Clause of the U.S. Constitution, Art. IV, § 3, Cl. 2, provides in relevant part that:

> "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; . . ."

The Desert Land Act of 1877, 19 Stat. 377, 43 U.S.C. §§ 321-323, provides in relevant part:

> "That it shall be lawful for any citizen of the United States, or any person of requisite age 'who may be entitled to become a citizen, and who has filed his declaration to become such' and upon payment of twenty five cents per acre—to file a declaration under oath with the register and the receiver of the land district in any which any desert land is situated, that he intends to reclaim a tract of desert land not exceeding one section, by conducting water upon the same, within a period of three years thereafter, *Provided however* that the right to the use of water by the person so conducting the same, on or to any tract of desert land of six

hundred and forty acres shall depend upon bona fide prior appropriation; and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the water of all [*sic*], lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights. Said declaration shall describe particularly said section of land if surveyed, and, if unsurveyed, shall describe the same as nearly as possible without a survey. At any time within the period of three years after filing said declaration, upon making satisfactory proof to the register and receiver of the reclamation of said tract of land in the manner aforesaid, and upon the payment to the receiver of the additional sum of one dollar per acre for a tract of land not exceeding six hundred and forty acres to any one person, a patent for the same shall be issued to him. *Provided*, that no person shall be permitted to enter more than one tract of land and not to exceed six hundred and forty acres which shall be in compact form.

"SECTION 2. That all lands exclusive of timber lands and mineral lands which will not, without irrigation, produce some agricultural crop, shall be deemed desert lands, within the meaning of this act, which fact shall be ascertained by proof of two or more credible witnesses under oath, whose affidavits shall be filed in the land office in which said tract of land may be situated—

SECTION 3. That this act shall only apply to and take effect in the States of California, Oregon and Nevada, and the Territories of Washington, Idaho, Montana, Utah, Wyoming, Arizona, New Mexico and Dakota, and the determination of what may be considered desert land shall be subject to the decision and regulation of the Commissioner of the General Land Office."

The Organic Administration Act of 1897, 30 Stat. 34, 16 U.S.C. §§ 473 *et seq.*, provides in relevant part that:

> "All waters within the boundaries of national forests may be used for domestic, mining, milling, or irrigation purposes, under the laws of the State wherein such national forests are situated, or under the laws of the United States and the rules and regulations established thereunder." 16 U.S.C. § 481.

STATEMENT OF THE CASE

1. Nature of the Controversy

Under California law, the State Water Resources Control Board (State Board) is authorized, upon application of a claimant, to conduct a statutory water rights proceeding to adjudicate the rights of all water users in a stream system. Cal. Water Code §§ 2500-2900. Pursuant to this authority, and in response to an application by a claimant, the State Board in 1976 commenced a statutory adjudication of all water rights in the Hallett Creek stream system, which is located in Lassen County, California. App. 1-2. After conducting the proceeding, the State Board issued its findings and order of determination, declaring and quantifying the rights of the claimants. App. 3.

One of the claimants was the United States, acting on behalf of the U.S. Forest Service, which administers the Plumas National Forest in Lassen County. App. 2. The United States claimed two kinds of water rights on behalf of the Forest Service: (1) a "reserved" water right under federal law for "primary" national forest purposes, defined as firefighting and road watering during timber harvesting; and (2) a "riparian" water right under California law for "secondary" national forest purposes, defined as "wildlife enhancement." App. 2-3.

The State Board upheld the United States' claim for a *reserved* water right for "primary" forest purposes, but denied the United States' claim for a *riparian* water right for "secondary" purposes. App. 3. The Board denied the riparian claim on grounds that (1) the United States constitutionally does not have the same "riparian" rights as ordinary landowners, and (2) Congress has "severed" and relinquished any such "riparian" rights in any event.

2. Proceedings Below

The State Board filed its order of determination in the Lassen County Superior Court, as required under the statutory adjudication procedure. Cal. Water Code § 2750; App. 4. The United States filed a notice of exceptions, objecting that the findings and order of determination improperly rejected the United States' riparian claim. App. 4. The Sierra Club successfully moved to intervene on behalf of the United States. App. 4. The Superior Court upheld the United States' exceptions, reasoning that the United States has the same riparian rights as ordinary landowners and that Congress has not severed or relinquished such rights. App. 4. The State of California appealed.

On appeal, the California Court of Appeal upheld the Superior Court determination that the United States has riparian rights in Hallett Creek. App. 4-5. The appellate court, however, ruled that the United States' riparian rights are "defeasible" by subsequent appropriative rights. App. 4-5.

The State filed a petition for review in the California Supreme Court, asserting that the Court of Appeal erred in holding that the United States has riparian rights. The United States and the Sierra Club also filed petitions for review, asserting that the Court of Appeal erred in holding that the United States' riparian rights are defeasible by subsequent appropriative rights. The California Supreme Court granted all three petitions for review.

The California Supreme Court, after review, affirmed the Court of Appeal decision to the extent that it held that the United States has riparian rights, and reversed the decision to the extent that it held that the United States' riparian rights are defeasible by subsequent appropriative rights. App. 1, 5. The Supreme Court ruled that the United States has the same riparian rights as ordinary landowners, and that Congress has not relinquished such riparian rights. App. 5-22. The Court also ruled that, since the United States' riparian rights for wildlife purposes in the Plumas National Forest are "unexercised," the United States must apply

to the State Board or the Superior Court prior to exercising such rights. App. 22-25.[1]

ARGUMENT

I

THIS CASE RAISES SIGNIFICANT AND NOVEL FEDERAL ISSUES CONCERNING THE NATURE OF UNITED STATES' WATER RIGHTS IN ITS LANDS

A. Federal Property Power

This case raises novel and significant federal questions that go to the heart of the federal property power. The first question is a constitutional one: whether the United States' water rights in its lands arise solely under the United States Constitution—and specifically under the Property Clause, U.S. Const., Art. IV, § 3, Cl. 2, which authorizes the United States to administer its lands—or instead whether the United States also has riparian water rights held by ordinary landowners under state common law. Under the Property Clause, the United States has the right to reserve water for use on its lands, with a priority date based on the date of the reservation. *United States v. New Mexico*, 438 U.S. 696 (1978). Thus, the United States, as a sovereign, holds *reserved* water rights that arise under the Constitution and belong solely to the United States. Under the *riparian* doctrine, on the other hand, an ordinary landowner has the right under the common law of many states to use water appurtenant to his lands, subject to reasonable use by other riparian landowners. *Lux v. Haggin*, 69 Cal. 255, 391 (1886); *Herminghaus v. Southern California Edison Co.*, 200 Cal. 81, 95 (1926); 1 S. WIEL, WATER RIGHTS IN THE WESTERN STATES ¶ 709, at 773-775 (1911 ed.). The riparian right attaches to land, and is not created by use or lost by nonuse. *Id.* Thus, the riparian right is an incident of land ownership under state common law, one of the "bundle of

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[1] The State filed a petition for rehearing, requesting that the Court clarify that part of its decision holding that the United States must apply to the State Board or the courts prior to exercising its rights. The Court denied the petition for rehearing without comment. App. 27.

sticks" that comprises property. Cf. *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979). The question here is whether the United States, in addition to holding reserved rights granted by the Property Clause, also holds riparian rights held by ordinary landowners under state common law.

As we shall explain, the United States' water rights arise solely under the Property Clause and thus do not include common law riparian rights held by ordinary landowners. This Court has held that the Property Clause affords the United States with "complete power" over its lands. *Kleppe v. United States*, 426 U.S. 529, 540 (1976). Because the United States' interests in its lands are constitutionally "complete," the United States does not have—and indeed does not need to have—common law property rights held by ordinary landowners under state law. Therefore, the United States does not have riparian rights. Its water rights in its lands are limited to reserved rights arising under the Property Clause. The United States' reserved rights are adequate to protect all relevant federal water interests in its lands.

If the United States were to have common law riparian rights, it would be able to claim a substantial portion of California's limited water supply simply on the basis of its sovereign land ownership. The United States owns approximately 48 percent of the land of California, and has reserved approximately 24 percent of California's land for national forests and national parks.[2] Therefore, if the United States has riparian rights, it would have a water right for nearly one-half, or at least one-fourth, of the land of California, depending on whether the right attaches to *all*

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[2] California has a total land area of 100,206,720 acres, and the United States owns 47.9 percent of this land. U.S. Dept. of Interior, Bureau of Land Management, "Public Land Statistics: 1986," v. 171, at 5 (1987) (hereinafter "1986 Statistics"). The United States has reserved 20 million acres of California land for national forests, and 4 million acres for national parks. U.S. Dept. of Interior, Bureau of Land Management, "Public Land Statistics: 1984," v. 169, at 14, 24 (1985). The Bureau of Land Management administers another 17 million acres as public domain lands, and the United States holds another 1.8 million acres as acquired lands. App. 5 n. 7.

federal lands or only federal *reserved* lands.[3] Under either construction, the United States could claim a property interest in a substantial portion of California's water supply, thus diminishing the availability of water for other important public and private needs. As the California Supreme Court noted below, no court has ever held that the United States has riparian rights in its lands. App. 5. Indeed, the United States has never previously asserted such rights, at least in California. App. 5. This important federal property question is one of first impression.

In a larger sense, the question concerns the nature of the United States' property rights in its lands, and transcends the water rights context in which the case arises. The question whether the United States has riparian rights ultimately turns on whether the United States' property interests in its lands—of whatever nature—arise solely under the Property Clause, or instead whether the United States has the same common law property rights as ordinary landowners. If the United States' property rights arise solely under the Property Clause, the United States presumably does not have the same common law property rights as ordinary landowners, and thus does not have riparian rights. If, on the other hand, the United States has the same common law property rights as ordinary landowners, the United States presumably can have riparian rights. This penumbral constitutional question is one of first impression.

This constitutional question determines, in turn, whether the United States' property interests in its lands are uniform throughout the nation, or instead vary from state to state depending on state and local rules of property. If the United States' property interests in its lands arise solely under the Property Clause,

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[3] The California Supreme Court held below that the United States has riparian rights in all lands "retained" by the United States—as opposed to lands "conveyed" by the United States to its patentees—but that the United States' riparian rights are subordinate to subsequent appropriative rights with respect to non-reserved lands, but not with respect to "reserved" lands. App. 18, 20-22. Thus, under the California Supreme Court analysis, the United States has riparian rights on *all* federal lands, and its riparian rights are not subordinate to subsequent appropriative rights on *reserved* lands.

presumably the United States' property interests are nationally uniform.[4] If, on the other hand, the United States' property interests in its lands arise under state common law, presumably the United States' interests vary from state to state, depending on state and local property rules. In this case, for example, if the United States has riparian rights under state common law, the United States' proprietary water rights would vary throughout the nation, depending on whether the state in which the federal property is located recognizes riparian rights.

B. Severance Doctrine

The second question raised in the case goes to the heart of federal water rights authority in the western states. The question is whether Congress' nineteenth-century land laws, particularly the Desert Act of 1877, terminated any "riparian" rights held by the United States in its lands, assuming that the United States constitutionally has such rights. In *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935), this Court held, in a landmark decision affecting western water law, that the Desert Land Act "severed" the water from the federal lands. The purpose of the severance, the Court stated, was not only to require the holders of federal land-conveying patents to acquire their water rights under state law, but also to encourage settlement of the West by making surplus water—*i.e.*, water not used by the patentees—available for the western settlers' varied agricultural, industrial, and mining needs. In short, the purpose of the severance was to encourage settlement by making water available to the settlers. This purpose is not consistent with retention of a federal "riparian" right, which would have discouraged settlement by reducing availability of water for the settlers. Therefore, Congress, in severing water from land, terminated any "riparian" rights held by the United States in its lands.

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[4] Conceivably, however, state property laws could be "borrowed" to develop a uniform national rule, assuming that federal law contains an interstice and that such borrowing is supported by federal policy. Cf. *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366-367 (1943); *United States v. Standard Oil Co.*, 332 U.S. 301, 310 (1947).

The California Supreme Court below concluded otherwise, holding that the severance affected only the federal patentees' water rights, not those of the United States. App. 18. In our view, the California Supreme Court decision conflicts with this Court's decision in *California Oregon Power*, which held that Congress severed land and water for the purpose of encouraging settlement. The retention of riparian rights by *either* the United States *or* its patentees would have equally discouraged settlement by reducing availability of water for the settlers. Indeed, because of the magnitude of federal land ownership in the West, the retention of the *federal* right would have had the more adverse impact on settlement. Therefore, Congress, in severing land and water, terminated any riparian rights held by the United States, not just those of its patentees. In any event, this Court has never directly addressed the question whether the severance affected the United States' own rights, and this historically significant question is directly raised here.

C. Wildlife Uses

The third question raised in the case is whether the United States can assert a "riparian" water right for wildlife purposes on national forest lands in light of this Court's decision in *United States v. New Mexico*, 438 U.S. 696 (1978), which holds that Congress did not intend to reserve water for such purposes because it wanted to make the water available to the settlers of the West. If Congress chose not to reserve water for wildlife purposes on national forest lands, the United States cannot assert a riparian right for the same purposes, for the assertion of the riparian right would contravene Congress' purpose in making the water available for the settlers. This important question has not been decided and is also one of first impression.

D. Regional and National Impact of Issue

The riparian doctrine originated in the English common law. The eastern states, following the English common law, have generally adopted the riparian doctrine as their basic water law. 1 WATERS AND WATER RIGHTS 29-31 (R. Clark ed., 1978

Supp.) (hereinafter "Clark").[5] The western states, on the other hand, have enacted statutes adopting the appropriation doctrine—which originated as a custom among the early gold miners—as their basic water law. 1 W. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES 6-14 (1971 ed.) (hereinafter "Hutchins"); 1 Clark 31. Under the appropriation doctrine, a non-riparian landowner can divert water for "beneficial use" to non-riparian lands. *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 742-749 (1950); *Jennison v. Kirk*, 98 U.S. 453, 458-459 (1878). Thus, the appropriation doctrine, unlike the riparian doctrine, is based on beneficial use rather than land ownership. The appropriative right belongs to the person, while the riparian right attaches to land. The appropriative right in California is statutorily regulated, while the riparian right is not. In effect, the western states, responding to unique conditions of aridity, have adopted a statutory appropriation doctrine rather than simply following the traditional common law property doctrine.

Some western states, following California's example, have adopted the statutory appropriation doctrine but otherwise retained the common law riparian doctrine. 1 Hutchins 6-14; 1 Clark 31.[6] The latter states have dual water rights systems that recognize both common law and statutory rights. The question in this case is whether the United States has common law riparian

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[5] In water law matters, Congress has generally regarded the "western" states as comprising the nineteen states lying west of the ninety-eighth meridian, and the "eastern" states as the thirty-one states lying east of that meridian. See, *e.g.*, Flood Control Act of 1944, 58 Stat. 887, 889; 1 Clark 65.

[6] The western states that recognize both riparian and appropriative rights, often called the "California Doctrine" states, are: Alaska, California, Hawaii, Kansas, Nebraska, North Dakota, Oklahoma, Oregon, South Dakota, Texas, and Washington. 1 Hutchins 6-14; 1 Clark 31 n. 69.

The western states that recognize only appropriative rights, often called the "Colorado Doctrine" states, are: Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, and Wyoming. 1 Hutchins 6-14; 1 Clark 31 n. 67.

rights in states that recognize such rights, which include the western states that have dual water rights systems and also the eastern states.

This question has particular significance in the western states that have dual water rights systems, such as California, because of the magnitude of sovereign federal land ownership in such states. As noted above, the United States owns approximately 48 percent of the land of California, and thus, under a riparian theory, would have a water right for nearly half the land of California.[7] The question here also has significance in the eastern states because the United States owns significant amounts of land in such states. For example, the United States owns at least 5 percent of the land of sixteen different eastern states, which comprise a majority of the thirty-one states generally regarded as eastern states. See note 5, *supra*.[8] Hence, although the question has particular

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[7] The United States also owns substantial quantities of land in other western states that have dual water rights systems. For example, the United States owns 48.8 percent and 30.7 percent of the land of Oregon and Washington, respectively. 1986 Statistics 5.

[8] The United States owns the following percentage of land of the following non-western states:

State	Percentage of Federal Land Ownership
Arkansas	10.3
Florida	12.3
Georgia	6.2
Kentucky	5.6
Michigan	9.7
Minnesota	6.8
Mississippi	5.9
Missouri	5.0
New Hampshire	12.8
North Carolina	7.7
South Carolina	6.2
Tennessee	8.0
Vermont	5.4
Virginia	9.6
West Virginia	7.9
Wisconsin	5.5

1986 Statistics 5.

significance in the western states that have dual water rights systems, the question has national significance as well.

II

THE UNITED STATES' PROPERTY RIGHTS IN ITS LANDS ARISE SOLELY UNDER THE UNITED STATES CONSTITUTION, AND THUS DO NOT INCLUDE COMMON LAW RIPARIAN WATER RIGHTS

As we now explain, the United States' property interests in its lands are sovereign rights that arise solely under the U.S. Constitution, and therefore do not include common law property rights held by ordinary landowners under state law. Therefore, the United States does not have common law riparian rights.

A. The Property Clause: "Complete Power" Over Federal Lands

The federal government is one of "delegated, limited, and enumerated" power, not "inherent" or "residual" power. *Kansas v. Colorado*, 206 U.S. 46, 87 (1907). Cf. *Milwaukee v. Illinois*, 451 U.S. 304, 313-314 (1981); *Erie v. Tompkins*, 304 U.S. 64, 78 (1938). The Property Clause of the Constitution delegates authority to the United States "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." U.S. Const., Art. IV, § 3, C1. 2; *Kleppe v. United States, supra*, 426 U.S. 529. In *Kleppe*, this Court stated that the Property Clause authorizes the United States to exercise "complete power" over its lands. 426 U.S. at 540, quoting from *United States v. San Francisco*, 310 U.S. 16, 30 (1940). This "complete power," the Court stated, enables the United States to " 'control their [the public lands'] occupancy and use, to protect them from trespass and injury and to prescribe the conditions upon which others may obtain rights in them. . . .' " 426 U.S. at 540. Since the Property Clause authorizes the United States to exercise "complete power" over its lands, the Property Clause "occupies the field" of the federal property power, and therefore the United States does not have the same common law property rights as ordinary landowners, which arise under state common law. Cf. *Milwaukee v. Illinois, supra*,

451 U.S. 304 (holding that Clean Water Act occupies field of federal pollution control and thus no common law remedies are available to abate pollution). Although the property rights of the United States and ordinary landowners may be *analogous* in many respects, they arise from different sources and are inherently different.

The California Supreme Court in the instant case held that the United States has the same rights as ordinary proprietors under state common law, citing *Kleppe's* dictum that the United States has the rights "both of a proprietor and of a legislature over the public domain." App. 9.[9] Although the United States does indeed have the rights of both "a proprietor and a legislature" over its lands, it does not follow that the United States' "proprietary" rights are the same as those of ordinary landowners. To the contrary, since the United States' proprietary rights arise under the Property Clause, its proprietary rights are inherently different than those of ordinary landowners, which arise under state common law. To illustrate the distinction, the United States may act as a "legislature" in regulating wild horses and burrows on public lands, as in *Kleppe*. Or the United States may act as a "proprie-

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[9] The *Kleppe* statement was dictum because the Court in *Kleppe* held only that Congress has *constitutional* power under the Property Clause to enact legislation regulating wild horses and burros on public lands, and that this constitutional power is analogous to, but greater than, the rights of ordinary landowners to regulate their lands. Thus, this Court did not determine whether the United States has the same common law property rights as ordinary landowners.

The California Supreme Court also cited this Court's dictum in *Camfield v. United States*, 167 U.S. 518, 524 (1897), where this Court stated that the United States has the rights of an "ordinary proprietor" in its lands. App. 9. The *Camfield* statement was also dictum because the Court in *Camfield* held that Congress had *constitutional* authority under the Property Clause to enact legislation prohibiting fences on public lands, and reasoned that Congress' constitutional authority is analogous to the rights of ordinary landowners to exclude trespassers. 167 U.S. at 528. This Court in *Kleppe* subsequently appeared to disavow the *Camfield* dictum, specifically rejecting the argument "that the United States has only the rights of an ordinary proprietor with respect to its lands." *Kleppe*, 426 U.S. at 539 n. 9.

tor" in reserving water for its own use on federal lands, as in *Cappaert v. United States*, 426 U.S. 128 (1976). The United States' "proprietary" right to reserve water derives from the Property Clause and is not subject to state law limitations, *Cappaert*, 426 U.S. at 138, and is thus different than the common law water rights of ordinary landowners. Therefore, whether the United States acts as a "legislator" or "proprietor" with respect to its lands, its rights are constitutionally-granted and do not arise under state common law. The California Supreme Court's conclusion—that the United States has the same rights as ordinary landowners because it has "proprietary" rights in federal lands—is a *non sequitur*.

The late Professor Frank Trelease, one of the most eminent commentators of western water law, has described the difference between the United States' property rights and those of ordinary landowners as follows:

> "[W]hen we say that the United States is the owner of the public domain, we give no power to the government by so saying. We are simply using the word 'owner' to express a complex of powers that we already have in mind. We mean something quite different from what we mean when we say John Smith is the owner of Blackacre. True, there are similarities. Both the United States and Smith have the power and capacity to acquire, hold, and transfer the land. But the differences are substantial. *Smith holds his property by virtue of local law; the United States holds lands by virtue of its own fiat.* Smith's property is subject to involuntary loss through seizure for taxes, condemnation, adverse possession, or action by his creditors; the public domain can only be lost with the consent of Congress. The private owner can dispose of his land only within the framework of local law, but the United States enacts new laws at will. The United States mixes concepts of sovereignty with its proprietorship, and enacts criminal statutes for the special protection of the public domain, but Smith must look to local law to regulate conduct on his land. The title passed to Smith's grantees may differ from that of the patentee of the public domain.

* * *

> "*It can thus readily be seen that government ownership is not the same as private ownership.*" F. Trelease, "Government Ownership and Trusteeship of Water," 45 CAL. L. REV. 638, 649-650 (1957) (emphasis added).

Thus, the United States does not have the same common law property rights as ordinary landowners.

B. Reserved Water Rights: Exclusive Federal Proprietary Water Rights in Federal Lands

The United States, which owns the public lands, occasionally reserves certain such lands for specific federal purposes, such as for national forests or national parks. *United States v. New Mexico, supra*, 438 U.S. at 698-702; *Cappaert v. United States, supra*, 426 U.S. at 138-139; *Arizona v. California*, 373 U.S. 546, 599-600 (1963). To accommodate the United States' water needs on reserved lands, this Court has developed the reserved rights doctrine. This doctrine holds that Congress, in reserving lands, impliedly reserves sufficient water to satisfy the purposes for which the lands are reserved. *Cappaert*, 426 U.S. at 138; *New Mexico*, 438 U.S. at 698.

The reserved rights doctrine, which emanates from the Property Clause and applies to the United States, is the constitutional analogue of the riparian doctrine, which emanates from state common law and applies to ordinary landowners. The former doctrine authorizes the United States to use water on its lands, and the latter authorizes ordinary landowners to use water on their lands. Where the proprietary rights of either the United States or ordinary landowners are inadequate to serve the purposes for which such rights exist, neither can assert the rights of the other, and both must seek additional rights through the appropriation process. The United States can no more assert riparian rights than ordinary landowners can assert reserved rights. Thus, the United States' proprietary water rights are limited to reserved rights and do not include riparian rights.

In 1978, this Court substantially limited the reserved rights doctrine by holding that the United States' reserved rights exist

only for "primary" reservation purposes, not for "secondary" reservation purposes. *New Mexico*, 438 U.S. 696. According to *New Mexico*, when the United States seeks to use water for "secondary" purposes, it must proceed "in the same manner as any other public or private *appropriator*." 438 U.S. at 702 (emphasis added).[10] In this case, the United States, rather than acquiring water for secondary purposes in the same manner "as any other public or private appropriator," claims a water right for such purposes under state common law property theories. The United States, unable to assert a *reserved* water right for secondary reservation purposes, asserts a *riparian* right for the same purposes. The United States attempts to invoke state common law property doctrines to gain what it lost by the narrowing of the reserved rights doctrine in *New Mexico*.

The United States' assertion of a riparian right contravenes the congressional policy enunciated in *New Mexico*. In *New Mexico*, this Court held that Congress, although constitutionally empowered to reserve water for secondary reservation uses, chose not to exercise this power because it wanted to "enhanc[e] the quantity of water that would be available to the settlers of the arid West." 438 U.S. at 713. Thus, Congress wanted to make the water available to the settlers, not for secondary reservation uses. If Congress had wanted to make the water available for secondary reservation uses, it would have simply exercised its constitutional power to reserve the water. By not exercising its constitutional power, Congress intended for the United States to stand in line with other public or private appropriators in acquiring water for secondary uses. As this Court stated in *New Mexico*:

> "Where water is only valuable for a secondary use of the reservation, . . . there arises a *contrary inference* that Con-

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[10] The California Supreme Court stated that this citation meant only that the United States must acquired water rights as an "appropriator" in states, such as New Mexico, that exclusively recognizes appropriative rights. App. 11. In the cited reference in *New Mexico*, however, this Court was referring to Congress' general policy of deferring to state water laws, not to New Mexico's special appropriative system. See 438 U.S. at 702.

> gress intended . . . that the United States would acquire water in the same manner as any other public or private *appropriator*." 438 U.S. at 702 (emphasis added).

The United States cannot circumvent Congress' policy of making water available to the settlers by simply changing the title of its water right.

III

CONGRESS' LAND LAWS, PARTICULARLY THE DESERT LAND ACT OF 1877, "SEVERED" ALL FEDERAL PROPERTY RIGHTS IN WATER EXCEPT AS SUCH RIGHTS ARE NECESSARY TO SERVE "PRIMARY" RESERVATION PURPOSES

As we now explain, Congress' nineteenth-century land laws, particularly the Desert Land Act of 1877, "severed" all federal property rights in water except as such rights are necessary to serve "primary" reservation purposes. Therefore, assuming that the United States constitutionally has riparian rights, these congressional land laws severed such rights. The land laws, beyond simply deferring to state water rights laws, were intended to make water available to the settlers. This congressional policy is incompatible with a federal "riparian" right, which would limit availability of water to the settlers.

A. The Severance Doctrine

In the nineteenth century, Congress enacted several land laws providing for disposition and settlement of the public domain. These enactments, as relevant here, are the Desert Land Act of 1877, 19 Stat. 377, 43 U.S.C. §§ 321-323, and the Mining Act of 1866, 14 Stat. 253, as amended, 16 Stat. 218 (1870), 43 U.S.C. § 661. The Desert Land Act authorized the issuance of patents to settlers in the western states, provided that their water rights "depend on bona fide appropriation," and declared that "all surplus water over and above such actual appropriation, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, *shall remain and be held free for the appropriation and use of the public for*

irrigation, mining and manufacturing purposes . . . ." 43 U.S.C. § 321 (emphasis added).

In *California Oregon Power Co. v. Beaver Portland Cement Co. supra*, 295 U.S. 142, this Court held that the Desert Land Act, if not the Mining Act, "severed" the water from the public lands in the western region. 295 U.S. at 158. The effect of the severance, the Court ruled, was to make water on the public lands available for appropriation under state law. *Id.* at 158, 162, 163-164.[11] The Court applied the severance only to hold that federal land-conveying patents do not include riparian rights, and therefore that patentees must acquire their water rights under state law. The Court did not consider whether the severance terminated any "riparian" rights held by the United States, which is the question raised here.

The California Supreme Court in the instant case determined that the Desert Land Act did *not* sever the United States' own "riparian" rights arising under state law. The Court reasoned that the severance applied only to lands "conveyed" by the United States to patentees, not to lands "retained" by the United States for its own use. App. 18. The Court concluded that the United States retains riparian rights in its lands in California, whether such lands are reserved or not. App. 18-19.

B. Congressional Policy of Making Water Available for Settlers

Contrary to the California Supreme Court's analysis, the language and policy of the Desert Land Act—as interpreted and applied in *California Oregon Power*—make clear that the Act severed the United States' own property rights in water, except as such rights are necessary to satisfy "primary" reservation purposes. The Desert Land Act specifically provided that the water on the public lands "shall remain and be held free for the appropriation and use of the *public* for irrigation, mining, and

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[11] The Court made clear, however, that the states were free to adopt either the appropriation doctrine or the riparian doctrine, and that the Desert Land Act did not force either rule upon the states. 295 U.S. at 163-164.

manufacturing purposes. . . ." 43 U.S.C. § 321 (emphasis added). This Court stated in *California Oregon Power* that the Act's purpose was to make unappropriated water available "for the use of the public" and to "further the disposition and settlement of the public domain." 295 U.S. at 162, 161. Thus, Congress' land policy was to make the water available for the settlers' needs rather than for federal secondary uses. Congress' policy was to use water as a means to encourage settlement of the West and thus fulfill America's "manifest destiny." This congressional policy is not compatible with a federal "riparian" water right—even one based on state law—because such a federal right would limit availability of water for the settlers' needs and thus impede settlement. If Congress was unwilling to exercise its *constitutional* right to reserve water for secondary reservation uses—because Congress wanted to make the water available for the settlers—Congress manifestly did not intend for the United States to assert common law property theories for the same purpose. Therefore, the severance enunciated in *California Oregon Power* applied to the United States' own "riparian" rights, assuming that it has any.

The California Court of Appeal, in the proceedings below, recognized the potency of Congress' land policy by holding that the United States' "riparian" rights are defeasible by subsequent appropriative rights. App. 39-41. The Court of Appeal analysis at least has the virtue of consistency with Congress' policy of making water available for the settlers, although the analysis suffers from the vice of creating a defeasible riparian right that is without precedence in western water law. The California Supreme Court rejected the Court of Appeal analysis, however, and held that the United States' riparian rights are *not* defeasible by subsequent appropriative rights. App. 19-22. Thus, the California Supreme Court analysis lacks even the virtue of consistency with Congress' policy of making water available to the settlers. The only analysis that is consistent both with Congress' land policy and with traditional water law principles is that the Desert Land Act severed all federal property interests in water except as such interests are necessary to serve primary reservation purposes. This

analysis accommodates both the settlers' needs and the United States' primary needs.[12]

C. Applicability of Desert Land Act to Reserved Lands

The California Supreme Court, in holding that the United States' "riparian" rights are not defeasible by subsequent appropriative rights, relied on this Court's decisions in *Federal Power Comm'n v. Oregon (Pelton Dam)*, 349 U.S. 435 (1946), and *Cappaert v. United States, supra*, 426 U.S. 128. In *Pelton Dam* and *Cappaert*, this Court stated that the Desert Land Act does not apply to *reserved* lands. *Pelton Dam*, 349 U.S. at 446-448; *Cappaert*, 426 U.S. at 144.[13] The California Supreme Court, citing these analyses, held that the Desert Land Act had no effect upon the United States' riparian rights in reserved lands. App. 20-21.

The *Pelton Dam* and *Cappaert* analyses on which the California Supreme Court relied are inconsistent with this Court's recent

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[12] The California Supreme Court stated that its analysis is consistent with this Court's decisions holding that Congress has "traditionally deferred to state law in determining rights to water on federal lands." App. 10. In the cited decisions, however, this Court held that Congress required the United States to comply with state *appropriation* laws in acquiring water for federal use. See *New Mexico*, 438 U.S. at 702 (United States must acquire water rights for national forests "in the same manner as any other public or private appropriator"); *California v. United States*, 438 U.S. 645, 665 (1978) (United States must acquire water rights for reclamation projects pursuant to state "appropriation" laws). Thus, Congress, beyond generally deferring to state water rights laws, required the United States to acquire its own water rights under state "appropriation" laws, not under state common law property theories. Congress intended for the United States to stand in line with other appropriators who must satisfy state water rights authorities that their proposed uses are "beneficial" under the appropriation laws. Congress did not intend for the United States to circumvent the appropriation process by claiming a common law property right in water simply on the basis of its sovereign ownership of the public domain.

[13] In *Pelton Dam* and *Cappaert*, this Court held only that the United States' reserved rights are not subject to state law, and did not consider whether the United States has common law riparian rights.

decision in *United States v. New Mexico, supra*, 438 U.S. 696, as the Court of Appeal below properly recognized. App. 41. In *New Mexico*, this Court held that the United States must acquire water for secondary purposes on *reserved* lands under state appropriation laws. The Court based its analysis on several congressional statutes—including the Desert Land Act and the Mining Act—that, in the Court's words, create an "inference" that the United States must acquire water for secondary reservation purposes under state appropriation laws. 438 U.S. at 702, & n. 5. Since the Court held that the Desert Land Act and Mining Act, among others, makes state appropriation laws applicable on reserved lands—to the extent that secondary purposes are involved—the Court necessarily overruled, *sub silentio*, its earlier analyses in *Pelton Dam* and *Cappaert* that the Desert Land Act does not apply on reserved lands. This Court's decisions in *New Mexico, Pelton Dam* and *Cappaert* are reconcilable only if the Desert Land Act is held to apply to reserved lands except where primary reservation purposes are involved. This Court should review this case, among other reasons, to resolve the conflict between its analyses in *New Mexico, Pelton Dam* and *Cappaert*.[14]

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[14] The California Supreme Court attempted to reconcile *New Mexico* with *Pelton Dam* and *Cappaert* by stating that the states' authority to apply their water laws to secondary reservation uses arises under the constitutional equal footing doctrine rather than the Desert Land Act. App. 21 n. 15. Although this Court has indeed invoked the equal footing doctrine in holding that state water laws apply to federal agencies, the Court has primarily relied on Congress' land and reclamation laws, including the Desert Land Act, to reach that result. See, *e.g.*, *New Mexico*, 438 U.S. at 702; *California v. United States, supra*, 438 U.S. at 655-662 (1978).

IV

THE ORGANIC ADMINISTRATION ACT OF 1897, AS INTERPRETED IN THIS COURT'S RECENT DECISION IN *UNITED STATES V. NEW MEXICO*, PRECLUDES THE UNITED STATES FROM ASSERTING RIPARIAN RIGHTS FOR WILDLIFE PURPOSES ON NATIONAL FOREST LANDS[15]

The Organic Administration Act of 1897, 30 Stat. 34, 16 U.S.C. §§ 473 *et seq.*, authorizes the reservation of public lands for national forest purposes. The federal lands in the instant case were reserved for national forest purposes pursuant to the Organic Administration Act. App. 4 n. 5. In *United States v. New Mexico, supra*, 438 U.S. 696, this Court held that the United States could not assert a reserved water right under the Organic Administration Act for "wildlife protection" purposes on national forest lands, because the water was to be used "principally as a means of enhancing the quantity of water that would be available to the settlers of the arid West." 438 U.S. at 713. To reserve water for "wildlife protection" purposes, the Court stated, "would defeat the very purpose for which Congress did create the national forest system." *Id.* at 711.

In this case, the United States asserts a *riparian* right for the same "wildlife protection" purposes for which a *reserved* right was unsuccessfully asserted in *New Mexico*. If Congress did not intend for the United States to *reserve* water for wildlife purposes—because Congress wanted the water to be used "principally as a means of enhancing the quantity of water that would be available to the settlers of the arid West"—Congress did not intend for the United States to assert a *riparian* water right for the same purpose. If Congress was unwilling to exercise its *constitutional* power to reserve water for wildlife purposes, it did not

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[15] The State did not raise the Organic Administration Act issue as a separate basis for rejecting the United States' riparian claim in the proceedings below, but instead raised the issue as part of the "severance" argument discussed earlier. To ensure that the State has the right to raise the Organic Administration Act issue in the instant proceeding, the State has raised the issue separately from the severance issue.

intend for the United States to assert common law property rights for the same purpose. The United States cannot circumvent Congress' policy of making water available to the settlers by simply changing the title of its water right. Thus, the Organic Administration Act, as interpreted in *New Mexico*, precludes the United States from asserting a riparian right for wildlife purposes on national forest lands.

V

RECOGNITION OF A FEDERAL RIPARIAN RIGHT WOULD CREATE POTENTIAL UNCERTAINTIES WITH RESPECT TO STATE WATER RIGHTS SYSTEMS

A. Availability of Water for Future Uses

Recognition of a federal riparian right would create potential uncertainties with respect to state water rights laws in various ways. First, such recognition would limit the availability of water for *future* public and private needs. In this case, for example, the United States' diversion of water for wildlife purposes in the Plumas National Forest, to the extent that the water is not returned to the stream system, would reduce the availability of water for future downstream uses. Although the United States seeks the diversion of only a small amount of water in this case, a federal "riparian" right would have a substantially greater impact in other contexts, particularly because the United States owns approximately 48 percent of the land of California. See note 2, *supra*. The policy of the Desert Land Act and the Organic Administration Act, as noted earlier, was to make the water available for the settlers, not for secondary reservation uses. This congressional policy would be frustrated if the United States is able to assert common law riparian rights and thus reduce the availability of water for potential future uses.

B. Uncertainty With Respect to Existing Rights

Recognition of a federal riparian right would create potential uncertainty with respect to *existing* appropriative and riparian rights in California. If the United States has riparian rights, the

rights of existing appropriative and riparian users may have to be reduced as necessary to accommodate the newly-recognized federal right.[16] Because of the magnitude of federal land holdings in California—as noted above, the United States owns approximately 48 percent of the land in California—recognition of a federal riparian right would have a substantially greater impact on existing water rights than recognition of a more conventional riparian right. Moreover, since the United States' "riparian" rights were apparently acquired in 1848, when the United States acquired from Mexico the land of what is now California, see 9 Stat. 922 (Treaty of Guadalupe Hidalgo), the United States' "riparian" rights would have attached prior to most appropriative and riparian rights in California.

The California Supreme Court properly noted that the State Board has some measure of regulatory control over riparian rights. App. 22-25. According to the Court, the State Board has the same right as citizens to seek judicial restraint of riparian rights that are not in compliance with California's constitutional "reasonable and beneficial use" requirement, or with California's public trust doctrine. App. 24 n. 16. Also, the State Board, in conducting statutory water rights adjudications, can reduce the priority of "unexercised" riparian rights and can quantify the amount of water necessary to satisfy such rights. App. 22-24. Since this case, fortuitously, consists of a Board-conducted statutory adjudication, and since the United States' "riparian" right in this case is concededly "unexercised," the State Board can prioritize and quantify the federal "riparian" right under the narrow facts of this case. App. 22-24.

On the other hand, the State Board's regulatory authority over riparian rights is substantially limited, and is much less than its

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[16] For instance, the United States, which owns the relicted lands surrounding Mono Lake in California, see *State of California, ex. rel. State Lands Commission v. United States*, 805 F.2d 857 (9th Cir. 1986), could potentially assert a riparian right to the lake's waters and thus reduce the amount of water available for diversion by the City of Los Angeles, which receives approximately 17 percent of its water supply from the lake tributaries.

authority over appropriative rights. Although the State Board "creates" appropriative rights by issuing permits, the Board has no control over the creation of riparian rights, which attach directly to land. Moreover, riparian rights, once created, constitutionally cannot be extinguished, whether such rights are "exercised" or not. *Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist.*, 3 Cal.2d 489 (1935). Thus, the State Board does not have the same regulatory control over riparian rights as over appropriative rights. Further, although the Board can prioritize and quantify "unexercised" riparian rights in a statutory water rights adjudication, the Board apparently lacks similar authority over *exercised* riparian rights, or over *any* riparian rights except in the statutory adjudication context.[17] Therefore, if the United States asserts that it has been *de facto* "exercising" its riparian rights—as the United States might do in asserting that existing streamflows through or appurtenant to federal lands cannot be reduced to make water available for other uses—the State Board

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[17] It is not clear, however, whether the State Board's authority is thus limited. The California Supreme Court, in describing the State Board's regulatory authority over "unexercised" riparian rights, cited and followed its earlier decision in *In Re Waters of Long Valley Creek Stream System*, 25 Cal.3d 339 (1979), which apparently held that the State Board can prioritize or quantify an "unexercised" riparian right in the context of a Board-conducted statutory water rights adjudiction. In the instant decision, however, the California Supreme Court cited *Long Valley* for the view that the United States "must apply to the Board or to the court" prior to exercising an "unexercised" riparian right, and that the Board and the courts have authority to reduce the priority of the right. App. 23-24. It is not clear whether the Court meant to apply this statement only to the *Long Valley* situation—which involves an "unexercised" riparian right in the statutory adjudication context—or instead whether the Court meant to apply this statement to *all* riparian rights in *all* contexts.

The State filed a petition for rehearing in the California Supreme Court seeking clarification of this question. The United States, curiously, filed an objection to the rehearing petition on grounds that the question should be clarified in future proceedings rather than the instant one. The California Supreme Court denied the State's rehearing petition without comment. App. 27.

would apparently lack authority to prioritize or quantify such a federal "riparian" right. Thus, recognition of a federal "riparian" right would place a cloud over existing water rights by potentially reducing the availability of water to satisfy such rights.

C. State Management and Planning Authority

Recognition of a federal riparian right would impair the State Board's ability to plan and manage the allocation of the California's sparse water supply. If the United States has riparian rights, it need not acquire appropriative rights under California law. The appropriation system is the principal means by which the State plans and manages the allocation of its water supply. Under this system, an appropriator applies to the State Board for an appropriative permit; the Board conducts a hearing to determine whether the proposed use is in the public interest, and whether the permit should be issued; and the Board's decision is subject to judicial review. Cal. Water Code §§ 1200-1706. In effect, the Board allocates water on a statewide basis through the appropriation process. The United States has always participated in the appropriation process, to the extent that it has been unable to assert reserved water rights under federal law. See, *e.g., California v. United States, supra*, 438 U.S. 645 (holding that United States must acquire water rights for federal reclamation projects under state "appropriation" laws). If the United States can circumvent the appropriation process on the basis of its sovereign land ownership, the State Board's ability to manage water allocation through the appropriation process would be impaired. Although the existence of riparian rights generally limits the State Board's management authority, recognition of a federal riparian right would have a substantially greater impact on the Board's management authority because of the magnitude of federal land holdings.

D. Derivative Riparian Rights.

If the United States were to have riparian rights, such rights might be derivatively asserted by private persons conducting operations on federal lands under federal authority. For example, the operators of private hydroelectric power projects that are located on federal lands and licensed under the Federal Power Act, 16 U.S.C. §§ 791(a)-793, might assert that the United

States has assigned it "riparian" rights to them, and thus that they need not comply with California's appropriation laws. Indeed, the operators of two different hydroelectric power projects in California are asserting this argument in pending litigation. *Rock Creek Limited Partnership v. State Water Resources Control Board, et al.*, No. Civ. 87-0523 LKK (E.D. Cal.); *Sayles Flat Hydro Associates, et al. v. United States, et al.*, No. Civ. 86-0868 LKK (E.D. Cal.). Similarly, the holders of grazing permits issued by the U.S. Bureau of Land Management under the Taylor Grazing Act, 43 U.S.C. § 315b, which authorizes grazing of cattle on public domain lands, might also assert a derivative federal "riparian" right. Such a right might also be asserted by persons conducting mining activity on federal lands under the Mining Act of 1872, 30 U.S.C. §§ 22-54. Thus, the California Supreme Court decision not only allows the United States to circumvent California's appropriation laws, but also potentially allows circumvention by large classes of non-federal users as well.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court grant the petition for writ of certiorari.

Respectfully submitted,

JOHN K. VAN DE KAMP
Attorney General for the State of California

R. H. CONNETT
Assistant Attorney General

RODERICK E. WALSTON
CLIFFORD T. LEE
Attorneys for Petitioners State of California, et al.

APPENDIX A

In the Supreme Court of the
State of California
S.F. 25133
CA 3 No. C000042 (3 Civ. 24355)
Super.Ct. No. 16291

In re Determination of Rights to
Water of Hallett Creek Stream System.

State Water Resources Control Board et al.,
Petitioners and Appellants,

v.

United States of America,
Claimant and Respondent;

Sierra Club, Inc.,
Intervener and Respondent.

[Filed Feb. 18, 1988]

In this case we must decide whether the United States has California riparian water rights on federal land reserved for national forest purposes, and, if so, whether such rights are inherently "defeasible," or subordinate to all other approved water uses. As to the first issue, we conclude that the federal government does have such riparian rights; as to the second, that those rights are no more defeasible than the riparian rights of other California landowners. The facts and the law underlying this controversy are set forth below.

FACTUAL AND PROCEDURAL BACKGROUND

In August 1976, a private water rights claimant petitioned the State Water Resources Control Board (Board) for a determination of the rights of various claimants to the use of the waters of

Hallett Creek Stream System in Lassen County.[1] After a preliminary investigation, the Board determined the public interest would be served by such a determination and granted the petition. (Wat. Code, § 2525.) Thereafter, various parties submitted proofs of claims to the water of Hallett Creek, including the United States acting on behalf of the United States Forest Service, a branch of the United States Department of Agriculture. (Wat. Code, §§ 2526, 2528.)

The United States claimed water for use in the Plumas National Forest. The rights claimed were of two kinds: (1) a "reserved" water right under federal law for "primary" national forest purposes, defined as firefighting and roadwatering, and (2) riparian[2] water rights under California law for "secondary"

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[1] Under provisions for a statutory adjudication of water rights (Wat. Code, § 2500 et seq.), the Board may determine "all rights to water of a stream system whether based upon appropriation, riparian right, or other basis of right" (Wat. Code, § 2501). The proceeding is initiated by a petition of one or more claimants to the stream system's water. If the Board finds that the public interest and necessity will be served by such a determination, it enters an order granting the petition. (Wat. Code, § 2525.) There ensues an investigation, notice, filing of proof of claims, and a hearing for contests of proof of claims. (Wat. Code, §§ 2550, 2575, 2600, 2650.) Following the hearing, the Board enters an "order determining and establishing the several rights to the water of the stream system." (Wat. Code, § 2700). A certified copy of the order is "filed with the clerk of the superior court of the county in which the stream system or some part thereof is situated." (Wat. Code, § 2750). The superior court then holds a hearing (Wat. Code, § 2751) and enters "a decree determining the rights of all persons in the proceeding." (Wat. Code, § 2768.) It was from such a decree that the Board took its appeal in this case.

[2] California law recognizes two primary water rights doctrines: riparian rights and appropriative rights. A riparian right accords to the owner of land bordering a watercourse the right to make reasonable and beneficial uses of the water on that land. Under the prior appropriation doctrine, a person who diverts or appropriates water from a watercourse and puts it to a reasonable and beneficial use acquires a right to that use which is superior to the rights of later appropriators. (See National Audubon Society v. Superior Court (1983) 33 Cal.3d 419, 441-443;

national forest purposes, described by the United States as "wildlife enhancement."[3]

After an evidentiary hearing, the Board issued its findings and determination, declaring and quantifying the rights of the various claimants. The Board upheld the United States reserved-rights claim, authorizing the Forest Service to divert and use up to 95,000 gallons of water annually for firefighting and roadwatering during timber harvesting.[4] The Board rejected, however, the United States request for recognition of unexercised riparian water rights for future wildlife-enhancement use. The Board concluded that under California law the federal government was not entitled to riparian rights, and ruled that in any event

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People v. Shirakow (1980) 26 Cal.3d 310, 307-308; see generally, Hutchins, The California Law of Water Rights (1956) pp. 40-41 (hereafter Hutchins).)

[3] Under the federal "reserved rights" doctrine, as explained hereinafter, when the United States "reserves" land from the public domain for purposes such as a national forest, it implicitly reserves the use of water sufficient to accomplish the "primary" purposes of the reservation, subject to whatever rights may have vested while the lands were in the public domain. (United States v. New Mexico (1978) 438 U.S. 696, 716.) The reserved right is deemed to be created at the time of the reservation. (Cappaert v. United States (1976) 426 U.S. 128, 138; Arizona v. California (1963) 373 U.S. 546, 600.) Since the federal government's reserved right is based on the property and supremacy clauses of the United States Constitution, the states may not deprive the federal government of the use of such water. (California v. United States (1978) 438 U.S. 645, 662; United States v. New Mexico, supra, 438 U.S. at p. 698.) Water for "secondary" forestry purposes, such as wildlife enhancement, must be acquired under the law of the state where the reservation is situated. (United States v. New Mexico, supra, 438 U.S. at pp. 701-702.) As will be explained, the Board contends that the United States could obtain water for wildlife enhancement only as an appropriator under California law, whereas the United States contends it could be entitled to such water either as an appropriator or by virtue of a California riparian right.

[4] The United States reserved right was given a second priority, junior to M.A. Clement and J.C. Bailey, each of whom was awarded a first priority in the amount of 30 gallons per day.

Congress had voluntarily "severed" or relinquished all proprietary claims to water within the national forest through the enactment of a series of nineteenth-century public land laws.

The Board filed its order of determination with the Lassen County Superior Court. (Wat. Code, § 2750.) The United States filed a notice of exceptions to the order of determination (Wat. Code, § 2757), objecting to the findings and order "to the extent that they [did] not allow the claim of the United States for an unexercised riparian water right. . . ." The Sierra Club successfully moved to intervene on behalf of the United States. After further briefing and a hearing, the superior court sustained the exceptions of the United States and the Sierra Club, ruling that the United States was entitled to the same riparian rights under California law as any other property owner, and, further, that federal legislation which had subordinated federal riparian rights to appropriative rights in the "public domain" did not apply to "reserved" lands in the Plumas National Forest.[5] The trial court's decree thus recognized that the United States had an unexercised riparian right to the use of the waters of Hallett Creek, but held that the United States must apply to the Board or to the court when and if it sought to exercise that right. The Board appealed.

The Court of Appeal affirmed the trial court's decree insofar as it recognized the United States claim to unexercised riparian rights under California law, but held that pursuant to federal legislation such rights were absolutely "defeasible," i.e. automatically subordinate to the rights of subsequent appropriators. All

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[5] "Public domain" lands are lands open to settlement, sale, or disposition under the federal public land laws. Such lands are generally managed by the Department of the Interior, through the Bureau of Land Management. "Reserved" lands are lands which have been removed from the public domain for some predetermined purpose, such as a national park, national forest, Indian reservation, or military reservation. Such lands may be reserved by statute, executive order or treaty. (Federal Power Comm'n v. Oregon (1955) 349 U.S. 435, 443-444.) The lands at issue here, the Plumas National Forest, were reserved by proclamation of President Theodore Roosevelt, dated July 14, 1905, and by proclamation of President William Howard Taft, dated July 28, 1910. (34 Stat. 3113 (1905); 36 Stat. 2731 (1910).)

three parties—the United States, the Board and the Sierra Club—filed petitions for review.

The United States and the Sierra Club challenge the Court of Appeal's holding that United States riparian rights are automatically subordinate to the claims of subsequent appropriators. The Board assails the Court of Appeal's conclusion that California law recognizes any riparian rights, defeasible or otherwise, federal lands. We granted all three petitions and subsequently permitted the Association of California Water Agencies, the Turlock and Modesto Irrigation Districts, and the Friant Water Users Authority to file amicus curiae briefs.[6]

We shall affirm that portion of the Court of Appeal judgment which recognizes riparian rights on federal reserved lands, but reverse that portion of the judgment which would subordinate such rights to all other approved uses.

INTRODUCTION

The issues presented are both novel and potentially significant. The United States has not heretofore claimed riparian rights in connection with its reserved lands in California. The Board asserts that recognition of such a claim could have far-reaching consequences, since the federal government owns a sizable percentage of the land in California.[7]

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[6] The amicus curiae briefs of the Association of California Water Agencies, a nonprofit corporation comprised of public water agencies, and the Friant Water Users Authority, a public agency comprised of 24 public districts which supply irrigation water received from the federal Central Valley Project, support the position taken by the Board in the current dispute. The amicus brief of the Turlock and Modesto Irrigation Districts curiously takes no position on the central issue, i.e., the existency of riparian rights in federal reserved lands held by the United States; it seeks, rather, recognition of riparian rights of federal licensees (both districts assert that they are licensees under the Federal Power Act, 16 U.S.C. § 791a et seq.), an issue which is not otherwise presented and on which we shall express no opinion.

[7] Figures cited by the Board and the United States indicate that the United States owns approximately 45 million acres out of the approxi-

The Board and the United States[8] vigorously dispute the meaning of water rights doctrines, Congressional enactments, and federal and state judicial decisions which date from as early as the mid-nineteenth century. A brief introduction to the subject, therefore, may be useful.

As noted earlier, the United States claims water in the Hallett Creek System on two separate grounds—"reserved" water rights under federal law, and "riparian" rights under California law. The reserved water rights doctrine provides that when the United States reserves land from the public domain for federal purposes, it implicitly reserves sufficient water to accomplish the purposes of the reservation. (See Cappaert v. United States, supra, 426 U.S. at pp. 138-142; United States v. New Mexico, supra, 438 U.S. at p. 698.) The United States thereby acquires a "reserved" water right (subject to whatever rights may have vested while the lands were in the public domain) which vests on the date of the reservation and is superior to the rights of future appropriators. (Cappaert v. United States, supra, 426 U.S. at p. 138.) The reservation doctrine thus constitutes an exception to the plenary authority which the states otherwise enjoy over the nonnavigable waters within their borders. (California v. United States, supra, 438 U.S. at p. 662.)

In the seminal case of United States v. New Mexico, supra, 438 U.S. 696, the United States Supreme Court construed the reservation doctrine narrowly, holding that a reservation of federal lands impliedly reserved only so much water as was necessary to

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mately 100 million acres in California, or 45 percent of the state's total land area. Of these 45 million acres, approximately 17 million acres remain as public lands administered by the Department of the Interior, Bureau of Land Management, 1.8 million acres are acquired lands, 20 million acres have been reserved as national forest lands, and 4 million acres have been reserved as national parks. (See United States Department of the Interior, Bureau of Land Management, Public Land Statistics 1984 (1985) at pp. 2, 10, 14, 22.)

[8] Because the arguments of the intervener Sierra Club and the United States are essentially the same in substance, we shall for convenience treat these contentions by reference nominally to the contentions of the United States only.

accomplish the "primary" or "specific" purposes of the reservation. (Id. at pp. 705-718.) In *New Mexico*, as here, the United States sought to acquire water for wildlife enhancement of certain reserved lands—the Gila National Forest in New Mexico. The Supreme Court held, however, that wildlife preservation constituted a "secondary" purpose of the national forests, the primary purposes being limited to timber and water preservation. (438 U.S. at pp. 696, 711-715.) Therefore, the court held, water for wildlife preservation purposes was not available under the reserved rights doctrine. (Id. at pp. 711-713.)

In so holding, however, the high court noted that the United States was free to seek water for wildlife preservation under *state* law. "Where Congress has expressly addressed the question of whether federal entities must abide by state water law, it has almost invariably *deferred to the state law.* [Citations.] Where water is necessary to fulfill the very purposes for which a reservation was created, it is reasonable to conclude, *even in the face of Congress' express deference to state water law in other areas*, that the United States intended to reserve the necessary water. Where water is only valuable for a secondary use of the reservation, however, there arises the contrary inference that Congress intended, *consistent with its other views*, that *the United States would acquire water in the same manner as any other public or private appropriator.*" (438 U.S. at p. 702, italics added.)

The only available method of acquiring water under New Mexico law was appropriation. California, however, is one of the few states which recognizes both appropriative and riparian rights. (National Audubon Society v. Superior Court, supra, 33 Cal.3d at pp. 441-443; see generally, Hutchins, supra, at pp. 40-54.) Accordingly, the United States has claimed a *riparian* right to the use of the waters of Hallett Creek for wildlife enhancement purposes. The United States asserts that it has the same riparian water rights under California law as any other "ordinary proprietor."

The Board vigorously opposes any recognition of riparian rights on federal reserved lands. Its argument is essentially twofold: First, the Board contends that the federal government may not exercise riparian rights under California law because the United

States is said to hold land as a "sovereign," not as an "owner;" its water rights, therefore, allegedly derive from, and are limited to, those delegated under the federal Constitution. Second, conceding arguendo that the federal Constitution does not bar the exercise by the United States of riparian water rights under California law, the Board contends that Congress, through the adoption of a series of mining and homestead laws during the mid-nineteenth century, voluntarily *relinquished* all proprietary claims to the western waters, except for reserved water rights. Each of these points is addressed in the discussion which follows.

DISCUSSION

A. Federal Proprietary Rights

The Board initially contends the United States does not "own" federal land in the sense that would allow it to claim riparian rights as an ordinary proprietor under state law. The United States, it is argued, holds land in its sovereign capacity; its sovereign authority derives exclusively from, and is limited to, the powers delegated by the federal Constitution; therefore, the federal government may not exercise proprietary rights that arise under state law. The argument is unmeritorious.

Private and government ownership of land obviously differ in certain fundamental respects. Unlike private property, government land usually cannot be condemned or seized, or obtained by adverse possession. A private owner holds property under local law; the government holds and controls land by virtue "of its own fiat" and may change the rules of ownership at will. (See Trelease, *Government Ownership and Trusteeship of Water* (1952) 45 Cal.L.Rev. 638, 649-653.) In this respect, to speak of government "ownership" is really to describe a variety of governmental *powers* over the regulation and control of the property it holds. Not surprisingly, therefore, a close reading of United States Supreme Court decisions involving water rights disputes between the states and the federal government reveals that the court has consistently premised its holdings on the sovereign rights, rather than the proprietary interests, of the United States. For example, the Supreme Court has recognized that under the federal Consti-

tution's commerce clause (U.S. Const., art. I, § 8, cl. 3) the United States has superior power to protect the navigability of a river from state action (the so-called "navigation servitude"; see United States v. Rio Grande Dam & Irrig. Co. (1899) 174 U.S. 690, 703), and under the property (U.S. Const., art. IV, § 3, cl. 2)[9] and supremacy (U.S. Const., art. VI, cl. 2) clauses the Supreme Court has held the states may not deprive the federal government of water sufficient to accomplish the primary purposes of a federal reservation (the "reserved rights" doctrine discussed earlier; see United States v. New Mexico, supra, 438 U.S. at p. 698; Arizona v. California, supra, 373 U.S. at pp. 597-598; Cappaert v. United States, supra, 426 U.S. at pp. 138-142).

Nevertheless, it has never been established that the federal government may not, in addition to its sovereign prerogatives, exercise the common law rights of an ordinary proprietor under state law. To the contrary, the United States Supreme Court has long recognized that "the [Federal] government has, with respect to its own lands, the rights of an ordinary proprietor, to maintain its possession and to prosecute trespassers. It may deal with such land precisely as a private individual may deal with his farming property." (Camfield v. United States (1897) 167 U.S. 518, 524.) In Kleppe v. New Mexico (1976) 426 U.S. 529, 540, the court reaffirmed this principle, holding that "the Property Clause gives Congress the power over the public lands 'to control their occupancy and use, to protect them from trespass and injury and to prescribe the conditions upon which others may obtain rights in them . . . .' [Citation.]" Under the powers granted by the United States Constitution, the court stated, *"Congress exercises the powers both of a proprietor and of a legislature over the public domain."* (Ibid., italics added.)

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[9] Under the property clause, "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State." (U.S. Const., art. IV, § 3, cl. 2.)

In recent decisions, moreover, the high court has reaffirmed the long-established principle that Congress not only may, but nearly always has, deferred to state law in determining rights to water on federal lands. (See California v. United States, supra, 438 U.S. at pp. 653-670; United States v. New Mexico, supra, 438 U.S. at pp. 701-702.) As the court observed in *New Mexico*: "Where Congress has expressly addressed the question of whether federal entities must abide by state water law, it has almost invariably deferred to the state law." (438 U.S. at p. 702.)

The *New Mexico* decision is particularly instructive for our purposes here. In that case, as noted earlier, the United States claimed rights to the water of the Rio Mimbres River in the State of New Mexico to maintain minimal instream-flows for fishing and recreation purposes in the Gila National Forest. That claim (unlike the United States claim made here) was based on *federal* law—the reserved rights doctrine—under which federal reserved lands are entitled to sufficient water to accomplish the purposes for which the lands were reserved. The Supreme Court ultimately rejected the claim, holding that the United States was entitled under federal law to only so much water as was required to accomplish the "specific" or "primary" purposes of the national forests, which did not include wildlife preservation. (438 U.S. at pp. 700, 706-709.)

Such a narrow construction of the reserved rights doctrine was compelled, the court held, by a congressional policy—enunciated in dozens of federal statutes dating from the Mining Act of 1866—"of deferring to state law." (438 U.S. at p. 702, fn. 5.) For example, the court noted that the National Park Service Act of 1946 had specifically authorized appropriations for the "[i]nvestigation and establishment of water rights *in accordance with local custom, laws and decisions of courts, . . . for the use and protection of water rights necessary or beneficial in the administration and public use of the national parks and monuments." (Id. at pp. 702-703.) Moreover, "[t]he agencies responsible for administering the federal reservations have also recognized Congress' intent to acquire under state law* any water not essential to the specific purposes of the reservation." (Id. at p. 702.) The Forest Service was no exception, the court noted, observing that

the Forest Service Manual itself states: "The rights to use water for national forest purposes will be obtained *in accordance with State law.*" (Id. at p. 703, fn. 7.)

Thus, as observed in *New Mexico*, "[w]here water is only valuable for a secondary use of the reservation . . . there arises the . . . inference that Congress intended, consistent with its other views, that *the United States would acquire water in the same manner as any other public or private appropriator.*" (438 U.S. at p. 702, italics added.) Although the State of New Mexico recognized only appropriative rights, the underlying principle of deference to state law logically extends to *any* water right recognized under local law—including riparian rights. Indeed, in a case concerning federal water rights at Camp Pendleton, California, the Ninth Circuit Court of Appeals specifically held that under California law the United States had riparian rights in "acquired" lands, i.e., lands acquired by the federal government from a nonfederal owner by purchase, condemnation, gift or exchange. (See California v. United States (9th Cir. 1956) 235 F.2d 647, 656.) The United States may similarly claim such rights in lands which it holds as the original owner.

There is no merit to the Board's contention that the United States Constitution precludes the federal government from acquiring riparian rights under California law.

B. Riparian Rights and The Severance Doctrine

We next consider the Board's contention that Congress affirmatively *relinquished* all proprietary claims to the waters of the West through the enactment of the Mining Acts of 1866 and 1870 and the Desert Land Act of 1877. The contention is rooted in events and laws which date from California's admission to the Union.

In 1850, California was admitted to the Union "on an equal footing with the original States in all respects whatever." (9 Stat. 452.) Although section 3 of the act of admission expressly reserved to the United States all "public lands" within California, no express provisions was made with respect to the waters in California's lakes, streams and rivers. (See California v. United States, supra, 438 U.S. at p. 654.) Under the so-called "equal

footing" doctrine, however, the United States Supreme Court recognized that new states were entitled to plenary control of the water within their territory on an equal footing with the original thirteen states. (See Kansas v. Colorado (1907) 206 U.S. 46, 92-95; United States v. Rio Grande Dam & Irrig. Co., supra, 174 U.S. at pp. 702-703, 709.)[10]

Almost simultaneously with California's admission to the Union, there occurred an event of nearly equal significance—the discovery of gold. As miners and settlers streamed into California, they took what water they needed to work their mines and farms by diverting it from the natural watercourses. From this process arose the local priority rule of "first in time, first in right," or prior appropriation. (See People v. Shirakow, supra, 26 Cal.3d at pp. 306-307.) The doctrine of prior appropriation sharply differed from the common law system of riparianism which had obtained in the East and which automatically entitled the owner of land bordering a watercourse to rights in the water.

As settlement of the West proceeded apace, two related and troubling issues remained unresolved: the rights of riparian owners versus appropriators, and the interests of the federal government in relation to private claimants. Although this court had approved and applied the doctrine of prior appropriation between private claimants at an early date (see Irwin v. Phillips (1855) 5 Cal. 140), our early decisions also recognized the potentially superior title of the federal government (see, e.g., Kidd v. Laird (1863) 15 Cal. 161, 181; Boggs v. Merced Mining Co. (1859) 14 Cal. 279, 374-375). With the enactment of the Homestead Act of 1862, which established formal procedures for the acquisition of federal lands, fears intensified that the rights of prior appropria-

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[10] The states' plenary authority over the waters within their borders is subject, of course, to the "reserved" rights doctrine, under which the federal government impliedly reserves from state control sufficient water to accomplish the purposes of the federal reservation (United States v. New Mexico, supra, 438 U.S. at pp. 700-702), as well as the so-called "navigation servitude," which protects the federal government's power under article I, section 8 of the federal Constitution to preserve the navigability of waterways (United States v. Rio Grande Dam & Irrig. Co., supra, 174 U.S. at p. 703).

tors could be defeated by the superior riparian rights of the federal government, or of federal patentees. (See Note, *Federal-State Conflicts Over the Control of Western Waters* (1960) 60 Colum. L.Rev. 967, 971.)

The Mining Act of 1866 (14 Stat. 253, ch. 262; 43 U.S.C. § 661) was intended to alleviate these concerns by authorizing miners to explore and occupy the public lands, and by expressly recognizing those rights to the use of water on public lands that had previously been recognized by state law.[11] An amendment in 1870 provided expressly that all patents issued thereafter would be subject to the water rights recognized by the Mining Act of 1866 (16 Stat. 218, ch. 235; 43 U.S.C. § 661.)[12] Together, these acts represented federal confirmation of the validity of water appropriations which were recognized under state and local law.

Moving from the protection of miners' claims to the problem of settlement and reclamation of the arid lands of the West, Congress passed the Desert Land Act of 1877 (19 Stat. 377, ch. 107; 43 U.S.C. §§ 321-323.)[13] That act provided for the sale of desert land to any settler intending to reclaim the land by irrigation, with

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[11] The act provided in pertinent part:

"Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; . . . ." (43 U.S.C. § 661 (1976).)

[12] The Patents Act of 1870 provides in pertinent part:

"All patents granted or preemption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by [the preceding] section." (43 U.S.C. § 661 (1976).)

[13] The Desert Land Act applies to California, Colorado, Oregon, Nevada, Washington, Idaho, Montana, Utah, Wyoming, Arizona, New Mexico, North Dakota, and South Dakota. (43 U.S.C. § 323 (1976).)

the following important proviso: "... provided, however, that the right to the use of water by the person so conducting the same, on or to any tract of desert land ... shall depend upon bona fide appropriation; and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes, subject to existing rights." (43 U.S.C. § 321 (1976).)

On its face, the Desert Land Act simply made the appropriation doctrine generally applicable to the waters of the West, limited the settlers' water rights to that which they had actually appropriated and used, and declared all surplus water to be free for appropriation by the public. (See Trelease, Federal-State Relations In Water Law (1971) at p. 147d.) The act would subsequently be accorded much greater significance by the state and federal courts, however, initially in the context of disputes between riparians and appropriators, later in cases involving the states and the federal government. In resolving these disputes, the various courts relied on differing theories as to the nature of the federal government's original proprietary interest in the waters of the West and the origin of state control over these waters. Although well over a century old, these debates provide live legal ammunition to both sides of the current dispute over the waters of Hallett Creek.

The theoretical, though not the chronological, starting point of the controversy may be conveniently placed at Lux v. Haggin (1886) 69 Cal. 255, widely recognized as the landmark decision holding that California adopted the riparian system of water rights when it received the common law in 1850. California thus became a "dual" water rights state, recognizing both riparian and appropriative rights. (See Hutchins, supra, at pp. 52-55.) *Lux* involved a dispute between riparian owners and appropriators of the waters of the Kern River. In determining that both riparian and appropriative rights exist in California, the court reasoned that although

the United States had retained title to the public lands and waters of the West, sovereignty had passed to the states as they were formed. Thus *the states* possessed the power to determine the rights that attached to federal lands. (69 Cal. at pp. 335-336.) Since California, by adopting the common law, had automatically recognized riparian rights, the court concluded that the federal government held riparian rights under state law as owner of the public lands, and that transfers to federal patentees carried with them riparian rights. "A grant of public land of the United States carries with it the common-law [riparian] rights to an innavigable stream thereon . . . ." (Id. at p. 336.) Of course, the *Lux* court recognized that such federal conveyances were subject to any reserved federal rights, as well as any private appropriations of water which the United States had "licensed" (id. at pp. 338-339) or, as a later court put it, "consented" to pursuant to the Acts of 1866, 1870 and 1877. (Palmer v. Railroad Comm'n (1914) 167 Cal. 163, 168-169.)

This concept of the nature of state sovereignty and of federal water rights became known at the California doctrine. (See Note, supra, 60 Colum. L.Rev. at pp. 972-973.) Countervailing theories of federal and state water rights developed in other western states, however, where California's dual model of coexisting riparian and appropriative rights was rejected in favor of a unitary system of prior appropriation. The Oregon courts, for example, agreed with California that the federal government originally held riparian rights to the waters of the public domain and that these rights survived the formation of the western states. The Oregon courts, however, construed the Desert Land Act as having "severed" or effected a "reservation" of the federal government's water rights, so that a federal patent conveyed rights only to land and not to water. Under the so-called Oregon doctrine, moreover, the Desert Land Act was construed as having established a "uniform rule" of appropriative rights in the western states. (The seminal Oregon decision is Hough v. Porter (1909) 98 Pac. 1083, 1091-1092.)[14]

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[14] The Colorado courts developed a third variation on this theme. Under a theory similar to that urged by the Board herein, Colorado denied that the federal government had ever held proprietary rights in the western waters; therefore, no theories of federal "acquiescence" in

The state courts continued to weave their separate theoretical tapestries for several decades. California continued to adhere to the theory that a federal patent conveyed to the patentee the riparian rights of the United States, subject to the rights of prior appropriators. (See, e.g., Palmer v. Railroad Commission, supra, 167 Cal. at pp. 168-169 ["The United States, with respect to the lands which it owns in the state, is a riparian proprietor as to the streams running through such lands. . . . [A] grant of its lands by the United States to a private person . . . would carry with it the riparian rights pertaining to that land . . ."]; see also, Duckworth v. Watsonville Water & Light Co. (1915) 170 Cal. 425, 431-432; Kings River Canal & Irrig. Co. v. Worsick (1922) 187 Cal. 674, 686, 690.) Indeed, in *Worsick* this court expressly rejected Oregon's view that the Desert Land Act had severed the United States riparian rights from the land itself. (187 Cal. at p. 690.)

Other California decisions, however, suggested that the federal government might not hold riparian rights under California law. (See, e.g., McKinley Bros. v. McCauley (1932) 215 Cal. 229, 231 ["[R]iparian rights do not attach to lands held by the government until such land has been transmitted to private ownership."]; accord, Rindge v. Crags Land Co. (1922) 56 Cal.App. 247, 252.)

Finally, in 1935, the United States Supreme Court resolved the doctrinal debate, holding that a federal patent of desert land did *not* automatically convey "federal" riparian rights. In California-Oregon Power Co. v. Beaver Portland Cement Co., (1935) 295 U.S. 142, a landowner whose title derived from a federal homestead patent issued in 1885 claimed the patent carried with it the common law riparian rights of the federal government. The Supreme Court, in considering the issue, reviewed the now familiar history of water law in the West, beginning with the informal evolution of appropriative rights, through the adoption of various state law systems during the federal period of "silent

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private appropriations or "reservation" of riparian rights from federal patents were required to justify Colorado's exclusive recognition of appropriative rights. (See Sternberger v. Seaton Mountain Elec., Light, Heat & Power Co. (1909) 102 Pac. 168; see generally Note, supra, 60 Colum. L.Rev. at pp. 973-975.)

acquiescence," and culminating finally with Congressional enactment of the Mining Acts of 1866 and 1870 and the Desert Land Act of 1877. (295 U.S. at pp. 154-158.) Focusing primarily on the Desert Land Act, particularly the clause declaring all surplus water to be "free for the appropriation and use of the public," the Supreme Court concluded: "If this language is to be given its natural meaning . . . it effected a *severance* of all waters upon the public domain, not theretofore appropriated, from the land itself. From that premise, it follows that a patent issued thereafter for lands in a desert-land state or territory . . . carried with it, of its own force, no common law right to the water flowing through or bordering upon the lands conveyed." (295 U.S. at p. 158, italics added.)

Thus, the United States Supreme Court essentially opted for the Oregon doctrine, concluding that the Desert Land Act had severed the waters of the public domain from the soil, so that a federal patent conveyed rights to land but not to water. Significantly, however, the high court rejected Oregon's view that the Desert Land Act had imposed a "uniform rule" of appropriation, holding instead that the act recognized each state's power "to determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain." (295 U.S. at p. 164.)

Based on the foregoing state and federal authorities, each party to the current dispute attempts to demonstrate conclusively that the federal government either has (the Board) or has not (the United States) expressly relinquished all claims to riparian rights under state law. The United States, embracing the California doctrine, argues as follows: This court's holding that a federal patent conveyed riparian rights to federal patentees (Lux v. Haggin, supra, 69 Cal. at p. 336) necessarily recognized the existence of riparian rights in federal lands. The Desert Land Act, with respect to the public domain lands where it applied, merely subordinated the common law riparian rights of the United States to the vested rights of prior appropriators already recognized under state law (Palmer v. Railroad Comm'n, supra, 167 Cal. at p. 168), but did not terminate the federal government's riparian rights altogether.

The Board, on the other hand, asserts a modernized version of the Oregon doctrine: The reason that a federal patent conveyed no water rights to the patentee (*California-Oregon Power*, supra, 295 U.S. at p. 158), the Board argues, is that Congress in enacting the Desert Land Act affirmatively "severed" or *relinquished* all proprietary claims to the western waters. Therefore, whatever riparian water rights in federal lands were recognized in Lux v. Haggin, supra, 69 Cal. 255, were effectively terminated by that act.

None of the cited decisions is dispositive of the issue before us. Each considered the question of federal water rights solely to evaluate the derivative claims of federal *patentees*; none addressed a water claim asserted by the federal government itself. The *California-Oregon Power* court, supra, 295 U.S. 142, in rejecting the view that a federal patent transferred riparian rights to the patentee and holding instead that Congress had "severed" the water from the land which it *conveyed*, did not state—or even suggest—that the United States had thereby "relinquished" all water rights in the land which it *retained*. Indeed, had that been Congress's intent, it is reasonable to assume that that is precisely what Congress would have said, and what the United States Supreme Court would have held.

Nothing in *California-Oregon Power*, supra, 295 U.S. 142, in the Desert Land Act, or in any of our early decisions construing that act, undermines the principle, uniformly recognized in *Lux* and its progeny, that riparian rights exist in federal lands located in California as surely as they inhere in private lands. (See Lux v. Haggin, supra, 69 Cal. at p. 335-336; Palmer v. Railroad Comm'n, supra, 167 Cal. at pp. 168-169.) We have never in California predicated the recognition of riparian water rights on the identity of the riparian owner, and we perceive no principled reason to do so now.

The Board's reliance on dictum in *McKinley Bros. v. McCauley*, supra, to the effect that "riparian rights do not attach to lands held by the government until such land has been transmitted to private ownership," does not establish otherwise. (215 Cal. at p. 231.) The dispute in that case was between a prior appropriator and a subsequent patentee of federal land, and the clear

purpose of the quoted statement was to indicate that the patentee's priority did not accrue, or "attach," against prior appropriators until the patent issued.

Accordingly, we conclude that under California law riparian water rights exist on federal lands located within the State of California.

C. Defeasibility of Riparian Rights Held by the United States in Reserved Lands

Although the Desert Land Act did not terminate the interests of the federal government in the waters of the public domain, it did subordinate those interests to the rights of subsequent appropriators recognized under state and local law. The Desert Land Act unequivocally provides that "all surplus water over and above . . . actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held *free for the appropriation and use of the public* for irrigation, mining, and manufacturing purposes subject to existing rights." (Italics supplied.) As the United States concedes, this language automatically subordinates the riparian rights of the federal government in the *public domain* lands covered by the act to the rights of appropriators established under state law.

The Court of Appeal, however, held that the Desert Land Act applied to federal *reserved* lands as well. Thus, while recognizing the existence of federal riparian rights in the Plumas National Forest, the Court of Appeal ruled that such rights must be regarded as "secondary to all other approved uses." The Court of Appeal coined a new term to describe the United States riparian interest—a "defeasible riparian water right." This holding was erroneous.

The Desert Land Act of 1877 and the Supreme Court's decision in *California-Oregon Power* spoke of "public lands." (43 U.S.C. § 321-323; 295 U.S. at p. 158.) As earlier noted, the term "public lands" (or "public domain") refers to lands owned by the federal government which have remained open to settlement, public sale or other disposition, and/or are now administered by the Department of the Interior through the Bureau of Land

Management. (See Federal Power Comm'n v. Oregon, supra, 349 U.S. 435, 443-444; Taylor Grazing Act, June 28, 1934, 48 Stat. 1269, as amended, 43 U.S.C. § 315 et seq.; Federal Land Policy and Management Act, 90 Stat. 2734, 43 U.S.C. § 1701 et seq.) Public domain lands are to be distinguished from "reserved lands," which are lands that have been reserved from the public domain for some predetermined purpose. (Cappaert v. United States, supra, 426 U.S. at p. 138.)

In *Federal Power Comm'n v. Oregon*, supra, 349 U.S. 435 (hereafter the *Pelton Dam* case) the United States Supreme Court held that the Desert Land Act and its predecessors, the Mining Act of 1866 and 1870, did not apply to federal lands which have been reserved from the public domain. "The purpose of the Acts of 1866 and 1870 was governmental recognition and sanction of possessory rights *on public lands* asserted under local laws and customs. [Citation.] The Desert Land Act severed, for purposes of private acquisition, soil and water rights *on public lands* . . . . [¶] [T]hese acts are not applicable to the reserved lands and waters here involved . . . . The lands before us in this case are not 'public lands' but 'reservations.' Even without that express restriction of the Desert Land Act to sources of water supply on public lands, these Acts would not apply to reserved lands." (349 U.S. at pp. 447-448; original italics.)

Pelton Dam was reaffirmed in Cappaert v. United States, supra, 426 U.S. 128. In that case, a private claimant asserted rights under state law to water that the federal government claimed it had reserved in connection with a national monument (Devil's Hole). The private claimants argued that the Desert Land Act had severed the nonnavigable waters from the federal lands so that Nevada's appropriation doctrine applied. (426 U.S. at p. 143.) The Supreme Court, citing *Pelton Dam*, flatly rejected the contention, stating: "[T]he Desert Land Act does not apply to water rights on federally reserved land." (Id. at p. 144.)

Pelton Dam, supra, 349 U.S. 435, and *Cappaert*, supra, 426 U.S. 128, make clear that the Desert Land Act does *not* apply to

reserved lands.[15] Thus, the act's provisions subordinating water rights in public domain lands to the vested rights of appropriators established under state law has no effect on riparian rights in federally held reserved lands.

The Court of Appeal, however, apparently believed that *Pelton Dam* and *Cappaert* had been overruled in United States v. New Mexico, supra, 438 U.S. 696. Not so. In *New Mexico*, the Supreme Court held that Congress had intended to reserve only so much water as was necessary to accomplish the primary purposes of the national forests, and the excess was to remain free for acquisition under state law. (Id. at p. 702.) The court relied in part on the Organic Administration Act of June 4, 1897 (30 Stat. 34, 16 U.S.C. § 473 et seq. (1976)), which carefully defined the purposes for which national forests could be reserved, and further provided: "All waters within the boundaries of national forests may be used for domestic mining, milling, or irrigation purposes, under the laws of the State wherein such national forests are situated . . . ." (Id. at p. 717, fn. 24.)

From the high court's holding that any water in excess of that reserved by the United States must be free for appropriation under state law, the Court of Appeal apparently inferred that any rights held or acquired by the United States must be regarded as secondary to all subsequent appropriations by the public. To the contrary, however, the court in *New Mexico* expressly stated that Congress had contemplated "*the United States* would acquire [unreserved] water in the same manner as any other public or private appropriator." (438 U.S. at p. 702, italics added.) Indeed, as the United States points out, Congress has expressly authorized the Forest Service to expend such funds "as may be necessary for the *investigation and establishment of water rights* . . .

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[15] The Board argues that if the Desert Land Act does not apply to federal reserved lands, it cannot be relied on for the application of state water law to such lands. The State of California's authority to regulate and control the water within its boundaries does not, however, rest on the Desert Land Act; that act merely recognized the state's preexisting authority over its waters under the "equal footing" doctrine. (See California v. United States, supra, 438 U.S. at pp. 653-656.)

necessary or beneficial in connection with the administration and public use of the national forests." (16 U.S.C. § 526, italics added.) Furthermore, although *New Mexico*, supra, 438 U.S. 696, spoke only in terms of "appropriation" (the exclusive water doctrine in the state of New Mexico), nothing in that decision limits the United States to the acquisition of appropriative rights where riparian rights are otherwise recognized under state law.

Moreover, there is no suggestion in New Mexico or in the Organic Administration Act of 1897 that Congress intended water rights, once acquired by the United States for secondary reservation purposes, to be subject to defeasance by subsequent claimants. We will not "impute to Congress a purpose to paralyze with one hand what it sought to promote with the other" (Clark v. Uebersee Finanz-Korporation (1947) 332 U.S. 480, 489; accord, American Textile Mfrs. Institute v. Donovan (1981) 452 U.S. 490, 513).

Nor does the concept of a federally held "defeasible riparian right" find any support in the law of California. As the Board readily concedes, the concept of a "defeasible" riparian right is without precedent in California. Though the unexercised riparian rights of any owner—governmental or otherwise—may be *limited* under California law, they cannot be altogether abolished. (See In re Waters of Long Valley Creek Stream System (1979) 25 Cal.3d 339, 357-359.)

We therefore conclude that the riparian water rights of the United States on its reserved national forest lands in California are as fully immune from defeasance as the riparian rights of a private owner.

D. Limitations on the Riparian Right

Finally, the Board and the amici curiae water districts contend that recognition of unexercised riparian rights in federal reserved lands will disrupt the settled rights of appropriators throughout the state and impair the Board's ability to plan and manage the allocation of the state's scarce water supply. These concerns are unfounded. As we stated in In re Waters of Long Valley Creek Stream System: "[T]he [State Water Resources Control] Board is authorized to decide that an unexercised riparian claim loses its

priority with respect to all rights currently being exercised. Moreover, to the extent that an unexercised riparian right may also create uncertainty with respect to permits of appropriation that the Board may grant after the statutory adjudication procedure is final, and may thereby continue to conflict with the public interest in reasonable and beneficial use of state water, *the Board may also determine that the future riparian right shall have a lower priority than any uses of water it authorizes before the riparian in fact attempts to exercise his right.* In other words, while we interpret the Water Code as not authorizing the Board to extinguish altogether a future riparian right, *the Board may make determinations as to the scope, nature and priority of the right that it deems reasonably necessary to the promotion of the state's interest in fostering the most reasonable and beneficial use of its scarce water resources.*" (25 Cal.3d at pp. 358-359; italics added.)

Thus the Board is fully empowered to make such "determinations as to the scope, nature and priority" of the unexercised federally-held riparian rights recognized herein, as the Board deems "reasonably necessary to the promotion of the state's interest in fostering the most reasonable and beneficial use" of its water resources. (In re Waters of Long Valley Creek, supra, 25 Cal.3d at p. 359.) Although, as the Board points out, the federal government's riparian rights may have theoretically "attached" when the land was reserved from the public domain, the Board may nevertheless order such rights subordinated to appropriative "rights currently being exercised," and may further "determine that the future riparian right [of the federal government] shall have a lower priority than any uses of water it authorizes before the riparian in fact attempts to exercise his right." (25 Cal.3d at p. 358.)

The trial court's decree recognized these principles in holding that United States had an *unexercised* riparian right to the use of waters in the Hallett Creek Stream System which may be subordinated to other uses. The trial court's decree specifically provided that holders of unexercised riparian rights in the Hallett Creek System, such as the United States, must apply to the Board or to the court for authority to exercise such rights, that such a determination shall be the subject of a supplemental decree, and

that such riparian rights "shall possess a priority as of the date of application to the Board or the court, as the case may be." The decree further provided that unexercised riparian rights shall be subject "to all rights defined in this decree, including any supplemental decree, as the said decree exists on the date of the application . . . by a riparian claimant," and shall likewise be subject to "any appropriative right initiated by application . . . prior to the date of application . . . by a riparian claimant." The United States did not contest this ruling, and expressly conceded in both its briefs and at oral argument that its riparian right was unexercised and subject to subordination.

Thus, pursuant to the trial court's decree, the United States must apply to the Board whenever it proposes to exercise its riparian right, so that the Board may evaluate the proposed use in the context of other uses and determine whether the riparian use should be permitted in light of the state's interest in promoting the most efficient and beneficial use of the state's waters.[16] This

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[16] In this regard, the Board expressed concern that future claims to riparian water on federal reserved lands may escape the Board's broad oversight authority in those circumstances where a private claimant fails to request a determination of "all rights to water of a stream system." (Wat. Code, § 2501.) The Board's concerns are groundless. Contrary to the Board's suggestion, it is *not* powerless to assert the state's interest in the conservation and efficient use of water absent the assertion of a private claim. Section 275 of the Water Code provides that the Board "shall take all appropriate proceedings or actions before executive, legislative, or judicial agencies to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water in this state." Pursuant to this authority, it has been held that the Board itself may bring a civil action to test the reasonableness of a riparian owner's use of water. (People ex rel. State Water Resources Control Bd. v. Forni (1976) 54 Cal.App.3d 743, 753.) And in determining what is a "reasonable' " use it is well settled that the court's inquiry, like the Board's, "cannot be resolved *in vacuo* isolated from statewide considerations of transcendent importance." (Joslin v. Marin Mun. Water Dist. (1967) 67 Cal.2d 132, 140.) This court has also recognized the standing of public interest organizations to sue to enjoin unreasonable uses of water (Environmental Defense Fund, Inc. v. East Bay Mun. Utility Dist. (1980) 26 Cal.3d 183), and of any member of the general

provision of the trial court's decree was fully consistent with the principles set forth in *In re Waters of Long Valley Creek System*, supra, 25 Cal.3d 339.

DISPOSITION

The judgment of the Court of Appeal is affirmed insofar as it affirmed the trial court's decree and recognized that the United States has an unexercised riparian right to use the waters of the Hallett Creek Stream System. Otherwise, the Court of Appeal's judgment is reversed with directions to require the Board and the trial court to apply the principles set forth in this opinion when and if the United States applies for the exercise of its riparian right.

Each party shall bear its own costs in this proceeding.

KAUFMAN, J.

WE CONCUR:

LUCAS, C.J.
MOSK, J.
BROUSSARD, J.
PANELLI, J.
ARGUELLES, J.
EAGLESON, J.

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public to raise a claim of harm to the public trust. (National Audubon Society v. Superior Court, supra, 33 Cal.3d at p. 431, fn. 11; Marks v. Whitney (1971) 6 Cal.3d 251.) Such claims may be brought in the courts or before the Board. (National Audubon Society v. Superior Court, supra, 33 Cal.3d at p. 449.) And in any lawsuit for a determination of rights to water, "the court may order a reference to the Board, as referee, of any or all issues" (Wat. Code, § 2000), or, alternatively, "may refer the suit to the board for investigation of and report upon any or all of the physical facts involved." (Wat. Code, § 2001.) Thus, it is clear that the Board's and the state's interest in the conservation and efficient use of water does not depend upon the fortuitous filing of claims by private parties, but may be asserted, and adequately protected, by initiative of the state itself or of concerned citizens.

IN RE DETERMINATION OF RIGHTS TO WATER OF HALLETT CREEK STREAM SYSTEM

S.F. 25133

COUNSEL FOR PARTIES:

For Appellants:	Roderick E. Walston Office of Attorney General 6000 State Building San Francisco, CA 94102 (415) 557-3920
For Respondent:	Robert L. Klarquist Dept. of Justice Washington, D.C. 20530 (202) 633-2731
For Intervenor:	Laurens H. Silver Sierra Club 2044 Filmore Street San Francisco, CA 94115
TRIAL COURT & NO.:	Lassen County 16291
TRIAL JUDGE:	Honorable Joseph B. Harvey

APPENDIX B

Order Due March 19, 1988

Order Denying Rehearing

S.F. No. 25133

In the Supreme Court of the
State of California

In Bank

[Filed Mar. 16, 1988]

In Re Determination of Rights to Water
of Hallett Creek Stream System.
State Water Resources Control Board
et al.,
Petitioners and Appellants,

v.

United States of America,
Claimant and Respondent;
Sierra Club, Inc.,
Intervener and Respondent.

Petitioners and Appellants' petition for rehearing DENIED.

LUCAS
Chief Justice

APPENDIX C

Certified for Publication

In the Court of Appeal
of the State of California
The Third Appellate District
(Lassen)
3 Civ. 24355
(Sup.Ct.No. 16291)

In the Matter of the Determination of
the Rights of the Various Claimants to
the Water of Hallett Creek Stream System
In Lassen County, California.

State of California and California
State Water Resources Control Board,
Appellants,

v.

United States of America,
Respondent,

Sierra Club, Inc.,
Intervenor and Respondent.

[Filed Dec. 5, 1986]

APPEAL from a judgment of the Superior Court of Lassen County, Joseph B. Harvey, Judge. Affirmed.

John K. Van De Kamp, Attorney General, R. H. Connett, Assistant Attorney General and Roderick E. Walston, Deputy Attorney General, for Appellants.

F. Henry Habicht II, Assistant Attorney General, Donald B. Ayer, United States Attorney and Sandra K. Dunn, and Albert M. Ferlo, Jr., for Real Party in Interest and Respondent.

Laurens H. Silver and Betsy Dodd, for Intervenor and Respondent.

The question in this case is whether the United States, as a landowner, may assert a riparian water right to a creek which crosses land reserved from the public domain for purposes of a national forest. The State Water Resources Control Board (Board) determined that the United States has no riparian water right in the creek. The Superior Court of Lassen County disagreed with the Board and entered a judgment holding that the United States has an unexercised riparian right in the waters of the creek. The Board appeals contending alternatively that the federal proprietary interest in federal lands does not include a riparian water right, or if it does, the United States has waived its riparian rights. We conclude that water on federal lands in excess of that reserved from public use is free for the appropriation and use of the public. We further hold that the United States may assert a defeasible riparian water right to that water to the extent that it has not been appropriated and is available. With this understanding we shall affirm the judgment.

FACTS

This proceeding commenced when a private claimant, George Bailey, petitioned for a statutory adjudication of water rights in Hallett Creek.[1] After a preliminary investigation the Board deter-

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[1] The procedure for a statutory adjudication of water rights had its genesis in the Water Commission Act of 1913. (Stats. 1913, ch. 586, § 1, p. 1012.) "The major purpose of the Water Commission Act was fourfold: (1) to vest in the Commission broad powers to investigate and develop the facts concerning water sources; (2) to regulate the acquisition of rights to appropriate water; (3) to provide a feasible method for the comprehensive determination of existing rights; and (4) to provide for distribution of water among those entitled to its use in accordance with the determined right of each user under state supervision." (Ferrier, Administration of Water Rights in California (1956) 44 Cal. L. Rev. 833, 834, fns. omitted.) The act, as amended, is now codified in the Water Code and the provisions dealing with statutory adjudications are presently found in Water Code section 2500 and following. Under this procedure the Board may determine "all rights to water of a stream system whether based upon appropriation, riparian right, or other basis of right." (Wat. Code, § 2501.) The procedure is initiated by a petition

mined that the public interest and necessity would be served by a determination of the rights in Hallett Creek, and arrangements were made to proceed with the determination. (Wat. Code, § 2525.) A number of persons submitted proofs of claims to the water of Hallett Creek, including the United States, acting through the United States Department of Agriculture, Forest Service. The United States based its claim upon two distinct theories: (1) a reservation of a water right by presidential proclamation in 1905 and 1910, reserving water rights for firefighting and roadwatering; and (2) a riparian water right for wildlife purposes.

The Board conducted an investigation and issued a preliminary report. Thereafter a hearing was held at which claimants were permitted to present evidence and argument. The Board then issued its findings and an order of determination declaring and quantifying the rights of the claimants to the creek system. The Board recognized that the United States has a reserved water right for lands withdrawn from the public domain for purposes of maintaining the forest land. It rejected, however, the United States' claim of a riparian water right for wildlife purposes.

In a statutory adjudication of water rights, the Board serves as an administrative arm of the court. (See Wood v. Pendola (1934) 1 Cal.2d 435, 443.) Pursuant to Water Code sections 2750 and

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of one or more claimants to water of any stream system, requesting a determination of the rights of various claimants. If the board finds that the public interest and necessity will be served by such a determination, it enters an order granting the petition and then proceeds with the determination. (Wat. Code, § 2525.) The statutory scheme provides for an investigation, notice, filing of proof of claims, and a hearing procedure for contests of the proof of claims. (Wat. Code, §§ 2550, 2575, 2600, 2650.) The Board then makes its "order determining and establishing the several rights to the water of the stream system." (Wat. Code, § 2700.) Thereafter a certified copy of the order of determination "shall be filed with the clerk of the superior court of the county in which the stream system or some part thereof is situated." (Wat. Code, § 2750.) A hearing is then held in the superior court. (Wat. Code, § 2751.) "After the hearing, the court shall enter a decree determining the rights of all persons in the proceeding." (Wat. Code, § 2768.) It is from such a decree that the Board is appealing in this case.

2751, the Board filed a certified copy of its order of determination with the court, and obtained a hearing date. The United States filed a notice of exceptions to the order of determination, seeking the recognition of an unexercised riparian water right for wildlife purposes. (Wat. Code, § 2757.)[2] The trial court agreed with the claim of the United States, and entered a decree recognizing that the United States has an unexercised riparian right to water for wildlife purposes. The Board appeals from this determination.

DISCUSSION

The property clause of the federal Constitution provides: "Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States. . . ." (U.S. Const., art. IV, § 3, cl. 2.) Under this clause the United States is both a proprietor and a Legislature with respect to federal lands. (Kleppe v. New Mexico (1976) 426 U.S. 529, 540 [49 L.Ed.2d 34, 44].) As a sovereign the United States' right to control federal lands, including the water courses traversing them, is superior to state law. Consequently, in the absence of specific authority from Congress, a state cannot legislatively destroy a federal water right. (United States v. Rio Grande Dam & I. Co. (1898) 174 U.S. 690, 703 [43 L.Ed. 1136, 1141].)

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[2] There are two primary water rights doctrines in California. "The two doctrines that govern rights to the use of watercourses in California are (1) the appropriation doctrine and (2) the riparian doctrine. . . . [¶] The appropriation doctrine contemplates the acquirement of rights to the use of water by diverting water and applying it to reasonable beneficial use for a beneficial purpose, in accordance with procedures and under limitations specified by constitutional and statutory law or acknowledged by the courts. The water may be used on or in connection with lands away from streams, as well as land contiguous to streams. . . . [¶] The riparian doctrine accords to the owner of land contiguous to a watercourse a right to the use of the water on such land. The use of the water is limited to riparian land." (Hutchins, The California Law of Water Rights (1956) p. 40; emphasis omitted.)

While the riparian theory of water rights may have been adequate to serve the needs of the eastern states, in the West it was found to be inappropriate. In order for the western states to be settled and developed it was essential that water be diverted from its normal course to lands where it could be beneficially used. For years the federal government silently acquiesced in the appropriation of water in the western states. (California Oregon P. Co. v. Beaver Port. C. Co. (1934) 295 U.S. 142, 154 [79 L.Ed. 1356, 1360].) In 1866, Congress provided: "That whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals, for the purposes aforesaid is hereby acknowledged and confirmed . . . ." (14 U.S. Stat. at L. 251, 253, enacting former 43 U.S.C. § 661.) In 1870, this act was amended to provide that whenever federal land is granted by patent, or a preemption or homestead is allowed, the land is conveyed subject to vested and accrued water rights. (16 Stats. at L. 217-218; see 30 U.S.C. § 52.) By these acts the federal government recognized and approved the appropriation theory of water rights to the extent it is recognized by the local customs, rules, and the legislation and judicial decisions of the arid land states. (California Oregon P. Co. v. Beaver Port. C. Co., supra, 295 U.S. at p. 155 [79 L.Ed. at p. 1360].)

If the acts of 1866 and 1870 did not constitute an abandonment of the common law riparian theory of water rights, they foreshadowed the more positive declarations of the Desert Land Act of 1877. (*Ibid.*) That act provided for the right of entry and reclamation of desert lands in the public domain, and provided that the right to use water thereon depends upon a bona fide prior appropriation. (43 U.S.C. § 321.) The Act further provided that "all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes subject

to existing rights." (*Ibid.*) The act declares that all persons with water rights which have vested and accrued and are recognized by local customs, laws and decisions, are to be protected in such rights, and patents, preemptions and homesteads are subject to vested and accrued rights. (43 U.S.C. § 661.)

It is said that the Acts of 1866, 1870 and 1877 operated as a severance of all waters on the public domain from the land itself. (California Oregon P. Co. v. Beaver Port. Co., supra, 295 U.S. at p. 158 [79 L.Ed. at p. 1361]; see also Federal Power Com. v. Oregon (1954) 349 U.S. 435, 447-448 [99 L.Ed. 1215, 1226].) Such a statement, however, must be qualified. What was actually severed was the common law riparian right to water on public lands. (California Oregon P. Co. v. Beaver Port. Co., supra, 295 U.S. at p. 158 [79 L.Ed. at p. 1362].) The acts do not affirmatively forbid a state from recognizing riparian water rights; instead they constitute a deferral to state and local law as the means by which the right to water is determined. (*Id.*, at p. 155 [79 L.Ed. at p. 1360].) The United States Supreme Court made it perfectly clear that the states affected by the acts are free to determine for themselves whether they shall recognize the rule of appropriation or adhere to the common-law rule of riparian rights. (*Id.*, at pp. 163-164 [79 L.Ed. at p. 1364].)

A majority of the western states adopted the appropriation theory of water rights. (1 Wiel, Water Rights in the Western States (3d ed. 1911) §§ 117-118, pp. 137-144.) A pure appropriation theory of water rights operates on a first-in-time, first-in-right basis. (Hutchins, The California Law of Water Rights, supra, at pp. 119-120.) These rights adhere at least to the extent the prior appropriator continues to use the right for beneficial purposes. (*Ibid.*) In view of the majority rule in the western states that all water is subject to appropriation and the first appropriator obtains priority, the question arose whether the United States could reassert water rights on federal land withdrawn from the public domain. This gave rise to the "reservation theory" of federal water rights. Under this theory, when the United States reserves land from the public domain for particular purposes, it will also be deemed to have reserved sufficient unappropriated water for those purposes. (Arizona v. California (1963) 373 U.S. 546, 599-600

[10 L.Ed.2d 542, 577-578].) The reserved rights doctrine is limited to scope: it encompasses only that amount of water necessary to fulfill the purpose of the reservation and without which the purposes of the reservation would be entirely defeated. (United States v. New Mexico (1978) 438 U.S. 696, 700 [57 L.Ed.2d 1052, 1057].)

In this case the federal land in question was withdrawn from the public domain by presidential proclamation for purposes of a national forest. It is established that in such circumstances the reserved water right does not include a right to water for wildlife purposes. (*Id.*, at pp. 711-712 [57 L.Ed.2d at p. 1064].) Accordingly, for the United States to claim a water right for such secondary purposes, it must establish its right in the same manner as any other public or private party. (*Id.*, at p. 702 [57 L.Ed.2d at p. 1058].)[3] And because the United States has deferred to state law as the basis for determining water rights, it must claim a right to use the water of Hallett Creek for wildlife under state law, if it is to do so at all.

Unlike most of the other western states, California recognizes the riparian doctrine of water rights. (Hutchins, supra, pp. 40-41.) In fact, our Constitution expressly recognizes both the riparian and appropriation doctrines. (Cal. Const., art. X, § 2.)[4]

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[3] In fact the Board recognized the United States' reserved water right for forestry purposes and confirmed its right to use 95,000 gallons annually for purposes of firefighting and roadwatering. No contention is raised with regard to this water right.

[4] Article X, section 2 of the California Constitution provides in relevant part: "Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such land are, or may be made adaptable, in view of such reasonable and beneficial uses; provided, however, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which the owner's land is riparian under reasonable methods of diversion and use, or as depriving any appropriator of water to which the appropriator is lawfully entitled." In general, "[t]he riparian doctrine confers upon the owner of land contiguous to a watercourse the right to the reasonable and beneficial use of water on his

The right to use water under either theory is limited to the reasonable and beneficial use of the water (*Ibid.*) In this case the waters of Hallett Creek are used by riparians and there is no conflict between riparians and appropriators.[5] Moreover, it is not contended that the use the United States wishes to make of the water is not a reasonable and beneficial use. The sole question presented in this appeal is whether the United States, as the owner of land abutting a water course, may assert a riparian water right under state law.

Although a number of courts have made gratuitous comments on the possibility of a riparian right in federal land, the question has not been squarely presented before. In McKinley Bros. v. McCauley (1932) 215 Cal. 229, at page 231, the court said: "The Gunning patent, under which the appellant claims, being subsequent in point of time to the Davis patent and appropriation under which the respondent claims, gave rise to no riparian rights as against it, for it is settled that riparian rights do not attach to lands held by the government until such land has been transmitted to private ownership." This statement has been taken by some to mean that there are no riparian rights attached to federal land. (See 62 Cal.Jur.3d Water, § 59, p. 95.) The statement, however, was dictum. That action involved a dispute between a prior appropriator and a subsequent patentee of public land. Pursuant to the express provisions of the Acts of 1866, 1870, and 1877, the subsequent patentee took his land subject to the prior appropriation. California courts have upheld the rights of an appropriator from federal land on the theory that by the Acts of 1866, 1870,

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land." (People v. Shirokow (1980) 26 Cal.3d 301, 307.) An historical overview of the California water rights system was recently recounted in National Audubon Society v. Superior Court (1983) 33 Cal.3d 419, 441-444, and need not be repeated here.

[5] It appears that one of the riparian claimants, George Bailey, also has an appropriative right in another stream system and the appropriated water reaches his land by being diverted into the Hallett Creek system. Bailey was adjudicated to have the entire right to use the appropriated water. No issue is raised with respect to the Bailey diversion, and no claimant asserts an appropriative right to divert water from Hallett Creek.

and 1877, and by the perfection of the appropriation, the United States granted its riparian rights to the appropriator. (See Duckworth v. Watsonville Water etc. Co. (1915) 170 Cal. 425, 432.) Accordingly, it was unnecessary for the *McKinley Bros.* court to consider whether there is a riparian right in federal land before an appropriator has perfected an interest.

The cases which the *McKinley Bros.* court said "settled" the question would not appear to have done so. In Canal & Irrigation Co. v. Worswick (1922) 187 Cal. 674, at page 686, the court noted that state courts have upheld the rights of a prior appropriator against a subsequent patentee of federal land but that the decisions did not fully explain their reasons. The court continued: "It is apparent, however, that they must be based on the hypothesis that the reservation provided for by section 17 of the act of 1870 in favor of accrued and vested rights runs to the appropriator of water upon land of the United States and creates in him a right superior to that of *the riparian right of the United States* pertaining to the land it then owns situated above the place of diversion, so that a subsequent purchaser of such upper lands takes subject to the lower appropriation." (Emphasis added.) In Rindge v. Crags Land Co. (1922) 56 Cal.App. 247, at pages 252-253, the Court of Appeal upheld the right of a prior appropriator against a subsequent grantee of federal land. The Court spoke of a riparian right attaching to federal land when it is transmitted to private ownership, but the court also somewhat inconsistently said that an appropriation "affects and divests the riparian rights otherwise attaching to public lands of the United States solely because the act of Congress declares that grants of public lands shall be made subject to all water rights that may have previously accrued to any person other than the grantee." These latter two decisions thus seem to support the idea that the United States does have a reparian water right in its lands until it is divested of such right by an authorized appropriation. In the final analysis, however, none of these cases was actually concerned with the assertion of a riparian right to unappropriated water on federal land, and thus cannot be regarded as authority for the issue we are considering.

Our research has also disclosed decisions which, again in dicta, have indicated the opposite of the *McKinley Bros.* dictum. In

Palmer etc. v. Railroad Commission (1914) 167 Cal. 163, at page 168, the Court said: "The United States, with respect to the lands which it owns in this state, is a riparian proprietor as to the streams running through such lands. It is only by virtue of that fact that it has any right or power of disposition over the waters thereof. And its right and power in that respect is no greater and no less than that of any other riparian proprietor." (See also Lux v. Haggin (1886) 69 Cal. 255, 338-340.) This statement has been taken to mean that the United States does have riparian rights in streams on its land. (Hutchins, The California Law of Water Rights, supra, pp. 204-205.) But this statement was also dictum. In *Palmer,* the issue was whether an appropriator of water held the water dedicated to public use. The court held that the rights of riparians and of appropriators are private interests whether the owner of the right be the United States, the State of California, or a private party, and in reaching that conclusion it was not necessary for the court to determine whether the United States may assert a riparian water right on federal lands.

The federal courts have also voiced opinions on the issue through dicta. In United States v. Central Stockholders' Corporation (1930) 43 F.2d 977, the United States, as an upper riparian, brought an action to quiet title against lower riparians. The action was brought in federal court in an effort to avoid adverse precedent of the California Supreme Court. The federal district court dismissed the action, noting "[p]lainly, the United States can have no different nor superior right as a riparian proprietor to that assigned private ownership." (At p. 980.) The Court of Appeals noted but did not decide the question. It affirmed the judgment of dismissal after modifying it to provide that it was without prejudice to the proprietary rights of the United States in and to its public lands and water rights appurtenant thereto. (United States v. Central Stockholders' Corporation (1931) 52 F.2d 322, 329.) In People of the State of California v. United States (9th Cir. 1956) 235 F.2d 647, at page 656, the court said with regard to a federal claim for water rights on a federal enclave: "The government, as regards all claimants to water outside the enclave, is not in the position of sovereign, but [is] in the position of a lower riparian which is compelled to make beneficial use within the watershed and for other than proper riparian uses must show

an appropriation according to law." However, there the vast majority of the land in the enclave was acquired from the state and from private parties and thus was not reserved from the public domain as was the land in this case.

The riparian water right as recognized in our law begins *ex jure naturae,* that is, by the law of nature. (Lux v. Haggin, supra, 69 Cal. at p. 390.) The right "is inseparably annexed to the soil, and passes with it, not as an easement or appurtenance, but as part and parcel of it. Use does not create the right, and disuse cannot destroy or suspend it." (*Ibid.*) In the absence of grant, license, or prescription, all riparian proprietors are entitled to the use of water in a stream adjacent to their land. (*Id.,* at p. 391.) Although California could have abandoned the riparian theory of water rights, it did not do so. The riparian theory is recognized both in judicial decision and in our Constitution. We can discern no justification for holding that riparian water rights inhere in some lands, but not in others, based solely upon the identity of the owner of the land.

We have already noted that the United States is both a legislature and a proprietor with respect to its public lands. In its sovereign capacity the United States has deferred to state and local law with respect to water rights in the western states. But the right the United States now asserts is based upon its proprietary capacity as a landowner. It is settled that with respect to federal lands the United States has the rights of an ordinary proprietor and may deal with such lands precisely as a private individual may deal with his lands. (Camfield v. United States (1896) 167 U.S. 518, 524 [42 L.Ed. 260, 262].) It follows that in respect to such lands the United States may assert the same proprietary interests, including a riparian water right, that a private individual could assert.

The Board insists that recognition of a federal riparian right in the United States will have calamitous consequences. If we accepted the premises of the Board's argument we might agree, but we cannot accept those premises. First, the Board asserts that recognition of a riparian water right in federal land would enable the United States to forego compliance with our state water law. This is not so. If anything can be regarded as settled with regard

to water in the western states, it is that with the exceptions of reserved water rights and the navigation servitude, the states have total authority over their internal waters and the United States must comply with state law. (California v. United States (1978) 438 U.S. 645, 662-663 [57 L.Ed.2d 1018, 1030-1031].) In fact, in order to facilitate state adjudications, the United States has expressly consented to be made a party to such actions. (43 U.S.C. § 666.) Recognition of a riparian right in the United States' land does not enable the federal government to ignore our water law with respect to those lands.

The Board next asserts that because the United States acquired its land from Mexico in 1848, its title would predate virtually all private water rights. Consequently, the Board warns, recognition of a riparian right in federal land would result in the destruction of private appropriative rights which have been exercised for years in reliance on a belief that the United States has no riparian right. We disagree. By the Acts of 1866, 1870, and 1877, the United States consented to the appropriation of its water rights. These Acts not only recognized and confirmed such rights as then existed, they reach into the future as well. (California Oregon P. Co. v. Beaver Port. C. Co., supra, 295 U.S. at p. 155 [79 L.Ed. at p. 1360].) By those acts, all sources of water on federal lands which are not navigable and have not been reserved are held free for the appropriation and use of the public. (43 U.S.C. § 321.) It is competent under our law for a riparian proprietor to sever his water right from his land and to convey it to another. (Hutchins, The California Law of Water Rights, supra, p. 193, and cases cited there.) Such a grant is binding upon the grantor and his successors in interest in the land. (California etc. Co. v. Madera etc. Irr. Co. (1914) 167 Cal. 78, 86; Duckworth v. Watsonville etc. Co. (1907) 150 Cal. 520, 526.) On such a theory our courts have always upheld the rights of an appropriator as against a subsequent grantee of federal lands. (McKinley Bros. v. McCauley, supra, 215 Cal. at p. 231; Rindge v. Crags Land Co., supra, 56 Cal.App. at p. 252.) The appropriator's rights are valid against the United States as well, both under our law and by virtue of the Acts of 1866, 1870 and 1877. Thus, any assertion of a federal riparian right in federal land is subject to the rights of appropriators and if the water has been appropriated then the

United States is precluded from asserting its riparian right. (See Carlsbad etc. Co. v. San Luis Rey etc. Co. (1947) 78 Cal.App.2d 900, 913.)

The Board asserts that even if the United States' riparian rights did not obtain priority in 1848, they must inevitably be held to have acquired priority when the federal land was reserved. Since most reserved federal land was reserved many years ago (in this case 1905), the Board argues that many subsequent appropriative rights will be disturbed. This point constitutes the major dispute between the parties. The Board insists that appropriations from reserved federal land should be upheld because there are no federal riparian rights on the land. The United States and the intervenor Sierra Club argue that by reserving federal land from the public domain the United States also reserved its riparian water rights on the land, and therefore subsequent appropriators will not have priority. In our view, neither position is accurate.

It is clear that by the Acts of 1866, 1870 and 1877, Congress severed the rights to water from federal land and intended that water should be held available for appropriation separately from the land. (California Oregon P. Co. v. Beaver Port. Co., supra, 295 U.S. at p. 158 [79 L.Ed. at p. 1361].) It is also clear that the United States may reserve both land and water from the public domain. (Arizona v. California (1963) 373 U.S. 546, 597-598 [10 L.Ed.2d 542, 576].) When the United States reserves land from the public domain without expressly reserving water rights, it will be implied to have reserved sufficient water for the purposes of the land reservation. (United States v. New Mexico, supra, 438 U.S. at p. 700 [57 L.Ed.2d at p. 1057].) Because the reservation doctrine is strictly limited, a reservation of land will be implied to have reserved only so much water as is essential to the purposes of the reservation. (*Ibid.*) It necessarily follows that water in excess of the reserved water right remains severed from the land and available for appropriation. This was the express holding of the United States v. New Mexico case.

The trial court believed that the severance doctrine was limited in Federal Power Com. v. Oregon, supra, 349 U.S. 435 [99 L.Ed. 1215]. In that case the Supreme Court considered whether a federal hydraulic power project to be built on federal land and

licensed by the Federal Power Commission would also be subject to licensing requirements of the State of Oregon. The Court held that federal law precluded such duplication of regulatory control. (349 U.S. at 445 [99 L.Ed. at 1224].) The Court also held that the Desert Land Act of 1877 did not give the state regulatory control over the project because the land had been reserved. (*Id.*, at p. 448 [99 L.Ed. at p. 1226].) That decision did not limit the "severance" doctrine because there the land was expressly reserved for power purposes and thus the reservation would include sufficient water for such purposes. (*Id.*, at pp. 438-439 [99 L.Ed. at p. 1221].) Moreover, the project was approved "subject to all existing rights to the use of the waters of the river, whether perfected or not." (*Id.*, at p. 441 [99 L.Ed. at p. 1222].) Thus the dispute involved the regulation of the project and not the source of the water to be used. In any event, to the extent the discussion in that case would support a claim that a reservation of federal land also reserves all unappropriated water on the land, it is inconsistent with the clear holding of United States v. New Mexico, supra, and the latter decision must be regarded as determinative.

While we believe that this discussion makes it clear that water on federal reserved land in excess of that which is reserved under reservation doctrine remains available for the appropriation and use of the public, this is particularly true of the reserved land in this case. As noted, the land involved here is national forest land. One of the primary reasons for the establishment of the national forest system was to preserve the water supply for appropriators. (United States v. New Mexico, supra, 438 U.S. at p. 712, esp. fn. 20 [57 L.Ed.2d at p. 1064].) In the Organic Administration Act of 1897, Congress specifically provided that waters within the boundaries of national forests may be used for domestic, mining, milling or irrigation purposes under state law. (16 U.S.C. § 481. See United States v. New Mexico, supra, 438 U.S. at p. 717, fn. 24 [57 L.Ed.2d at p. 1067].) Thus a reservation of land for national forest purposes manifestly does not reserve excess water from the public domain.

Our conclusion that water on federal lands in excess of that which is reserved under the reservation doctrine remains subject

to the appropriation and use of the public does not convince us that the United States must be forbidden to use such water until it is appropriated. Pursuant to the Acts of 1866, 1870 and 1877, the United States holds unreserved water on its lands open for the free appropriation and use of the public and its riparian rights must be regarded as secondary to all other approved uses. However, to the extent that there is available unappropriated and unused water the United States must be regarded as free to use such water as any other riparian might. The trial court's decree recognized that the United States has an unexercised riparian right to use the waters of Hallett Creek. In order to exercise this right the United States must apply to the Board, or to the court. (See In re waters of Long Creek Stream System (1979) 25 Cal.3d 339, 359, fn. 15.) When and if the United States should apply for the exercise of its right, the Board and the court must apply the principles we have set forth in this opinion. The decree of the trial court recognizing the unexercised riparian right of the United States, as construed in this opinion, is therefore entitled to be affirmed.

The judgment is affirmed.

(CERTIFIED FOR PUBLICATION.)

Sparks, J.

We concur:

CARR, Acting P.J.

SIMS, J.

APPENDIX D

The Superior Court of the State of California
in and for the County of Lassen

Case No. 16291

Tentative Decision and Proposed Statement of Decision

In the Matter of the Determination of
the Rights of the Various Claimants to
the Water of Hallett Creek Stream System
In Lassen County, California.

[Filed Jun 4, 1984]

This tentative decision shall be the statement of decision pursuant to Rule 232 of the California Rules of Court unless, within 10 days, either party specifies controverted issues or makes proposals not covered in the tentative decision. Because this is a proposed statement of decision, any party affected by the decision may serve and file objections to the proposed statement of decision within 15 days after it is served upon the parties. Rule 232(d).

This is a proceeding for the adjudication of the rights of the various claimants to the water in the Hallett Creek stream system in Lassen County, California, pursuant to the provisions of Water Code sections 2500-2866 The State Water Resources Control Board (SWRCB) has investigated the system pursuant to those sections and made its order determining and establishing the several rights to the water of the stream system under Water Code section 2700. The order has been filed in this court under Water Code section 2750. The United States has filed a notice of exceptions to the SWRCB's Order of Determination, and the Sierra Club seeks leave to intervene on behalf of the United States.

The United States and the Sierra Club claim that the SWRCB erred in determining that the United States does not have riparian rights incident to its ownership of National Forest lands. The United States and the Sierra Club seek a determination from this court that the United States is the owner of an unexercised riparian right in the amount of 300 gallons per day at spring

number 5. At the hearing in this court, no substantial question was raised concerning the facts supporting the claim of the United States; the dispute focused on the legal basis for the United States' claim. The SWRCB asserts that the United States has no riparian rights on its reserved lands (including National Forest lands); and the SWRCB further asserts that the Sierra Club is not legally permitted to intervene in these proceedings.

The Sierra Club seeks to intervene under the authority of Code of Civil Procedure section 387(a). The affidavits submitted by the Sierra Club in support of its application to intervene adequately demonstrate that the Sierra Club has an interest in the success of the United States in these proceedings. The SWRCB, however, disputes whether section 387 can be used to permit intervention in statutory adjudication proceedings under sections 2550-2866 of the Water Code. The SWRCB contends that section 387 cannot be applied in these proceedings, citing *Green v. Community Redevelopment Agency* (1979) 96 Cal.App.3rd 491. The *Green* case held that the intervention provisions of section 387 are superceded by the provisions of Code of Civil Procedure sections 860-870, and therefore a party barred from intervening under the procedure prescribed in sections 860-870 can not be permitted to intervene under the provisions of section 387. There, as here, the party seeking intervention was a person interested in the litigation within the meaning of section 387. However, the Court of Appeal held that the intervener was already before the court because the summons issued in proceedings under sections 860-870 is specifically addressed to all persons interested in the matter. Those sections provide for publication of the summons and a time limit for appearance in response to the summons. The proposed intervener in *Green*, having failed to respond the summons within the time prescribed by statute, thereafter sought to become a party to the litigation anyway by intervention under section 387. The Court of Appeal held that permitting intervention under section 387 would defeat the purposes of sections 860-870.

The situation here is not similar. The Sierra Club has not been, and could not have become, a party to this litigation in order to vindicate its interests. It can do so now only if section 387 applies. There is no time limit the Sierra Club seeks to avoid by proceed-

ing under section 387 as was the case in *Green*. It is not seeking to evade the consequences of a previous default as was the case in *Green*.

The intervener's affidavits show that its interests, and those of its members, will be directly affected by any judgment entered herein. By permitting intervention, the issues will not be enlarged; and intervention will not substantially affect the rights of the original parties to conduct the law suit on their own terms. See *People ex rel Rominger v. County of Trinity* (1983) 147 Cal.App.3d 655. Water Code section 2764 provides that the proceedings in this court shall be as nearly as may be in accordance with the rules governing civil actions. In the absence of any statutory restriction on intervention or any policy that would be thwarted by intervention (as in *Green, supra*), section 387 of the Code of Civil Procedure appears to be among the civil action rules to be applied to the proceedings in this court. Accordingly, the court grants the motion for leave to intervene.

The substantive dispute among the parties concerns the question whether the United States has riparian rights as an incident of its ownership of its reserved lands.

In 1886, the California Supreme Court held that the Legislature, by passing a statute adopting the common law of England, adopted the doctrine of riparian rights as part of the California Law. *Lux v. Haggin* (1886) 69 Cal. 255; *Hutchins, The California Law of Water Rights* (1956) 52-55. One would think, therefore, that the United States as a property owner would also have riparian rights in the waters flowing across its lands. The SWRCB argues, however, that because of the federal legislation of 1866, 1870 and 1877, the United States severed its interest in the waters flowing upon the public land. The SWRCB argues that riparian rights, once severed, cannot be reattached and, therefore, the only manner in which the United States can acquire water rights is either by implied reservation (see below) or by appropriation.

The SWRCB concedes that the California cases have repeatedly stated that the United States has riparian rights. *Palmer v. Railroad Commission* (1914) 167 Cal. 163; *Lux v. Haggin*

(1886) 69 Cal. 454; *Duckworth v. Watsonville Water & Delight Co.* (1915) 170 Cal. 425; *Holmes v. Nay* (1921) 186 Cal. 231; *San Joaquin & Kings River Canal & Irr. Co. v. Worswick* (1922) 187 Cal. 674. These cases, however, are dismissed by the SWRCB as containing dicta, and the SWRCB argues that later federal cases have made it clear that, in the light of the legislation mentioned, the United States does not retain riparian rights.

The SWRCB relies primarily on *California Oregon Power Company v. Beaver Portland Cement Company* (1935) 295 U.S. 142. That case, read expansively, might lead one to the conclusion asserted by the SWRCB. Indeed, read expansively, it might even be construed to impose a strict appropriation system of water rights on the states to which the Desert Land Act applies and the lands that were once part of the public domain. In that case, California Oregon Power sought an injunction to prevent Beaver Portland Cement Co. from interfering with its rights in the Rogue River as a riparian owner. California Oregon Power claimed to derive those rights from a homestead patent issued by the United States to a predecessor in interest. Neither of the parties had ever made any diversion of the waters for beneficial use. In 1909, the Oregon Legislature passed a law recognizing riparian rights only to the extent of actual application of water to beneficial use prior to the enactment of the 1909 law. Subsequent to that act, water rights could be obtained only upon petition to the state engineer. Hence, under the 1909 law, neither party was entitled to riparian rights.

Despite the 1909 Oregon law, the California Oregon Power Company asserted that it had obtained riparian rights by virtue of its homestead patent. The U.S. Supreme Court held, however, the Desert Land Act of 1877 and its predecessor statutes had effected a severance of the waters upon the public domain from the land itseld. Hence a patent issued by the United States would not carry with it the common law riparian right to the water flowing through the land. The court said that Congress intended to establish the rule that the land should be patented separately from the water, and that all non-navigable waters thereon should be reserved for the use of the public under the laws of the states and territories involved. "It is hard to see how a more definite

intention to sever the land and water could be evinced." 299 U.S. at 162.

The California cases have never followed *California Oregon Power* insofar as it may be construed to hold that *no* United States patents granting title to the public domain in the western states give rise to riparian rights because the Desert Land Act and its predecessor statutes have separated the common law water rights from the land. California has always recognized that a patentee acquires riparian water rights subject, however, to valid appropriations of the water made while the land was in the public domain.

If the theory of the SWRCB were followed to its logical conclusion, the federal statutes construed in *California Oregon Power* would have severed the riparian water rights from the land, and once severed those riparian water rights could never be reattached, and therefore patentees of the public domain would receive only the land and could obtain water rights only by valid appropriation.

That is not the California law, however. The SWRCB recognizes that patentees obtain water rights as riparians, subject to prior valid appropriations. Hence, it is apparent that the Desert Land Act must function somewhat differently in a state such as California that recognizes a dual system of water rights and a state such as Oregon that by state law recognizes only an appropriative system of water rights.

Later United States Supreme Court cases have substantially limited the sweep of the language used in *California Oregon Power*. In *Federal Power Com. v. Oregon* (1954) 349 U.S. 435, Justice Douglas in dissent argued in effect the position taken by the SWRCB here. He argued that the Desert Land Act and its predecessor statutes severed the water from the land, and therefore, even on lands reserved by the United States from the public domain, the United States could not obtain water rights for its reserved lands except by applying for appropriative rights under the laws of the state involved. This position, however, was rejected by the majority. The majority pointed out that the Desert Land Act and its predecessor statutes apply only to the public domain.

That legislation does not apply to reserved lands held by the United States even though those lands may have formerly been part of the public domain. The specific issue before the United States Supreme Court was whether the United States or its licensee could construct a power dam across a river, the dam being located on each side of the stream upon lands reserved from the public domain for power purposes. The Supreme Court held that the Desert Land Act and its predecessor statutes simply did not apply for the reason that the lands involved were reserved lands, not "public lands" or "public domain" within the meaning of the Desert Land Act. 349 U.S. at 448.

In *United States v. New Mexico* (1978) 438 U.S. 696, the Supreme Court pointed out that where water is necessary to fulfill the very purpose for which a federal reservation is created, it is reasonable to conclude that the United States also intends to reserve the water necessary for that purpose. 438 U.S. at 702. That, of course, would explain the ruling in *Federal Power Commission v. Oregon.* But, in *United States v. New Mexico,* the Supreme Court went on to hold that where water flows across federal reserved land and these waters are valuable only for a secondary use of the reservation, it is the Congressional intent that the United States "would acquire water in the same manner as any other public or private appropriator". 438 U.S. at 702. The Supreme Court went on to state that federal legislation and agencies responsible for administering the federal reservations have recognized Congress' intent that the United States acquire water not essential to the specific purposes of the reservation in accordance with local custom, laws, and decisions of the local courts. 438 U.S. at 703.

Thus, although the *California Oregon Power Co.* case can be read as stating an intent on the part of Congress to impose an appropriative system of water rights upon the western states, the later cases have made it clear that the Desert Land Act permits appropriation of water upon the public domain in accordance with the laws of the several states, but the United States' water rights in regard to its reserved lands consist of both the waters needed for the primary purpose of the federal reservation as well as such other rights as may arise under the laws of the state in question.

These cases harmonize the Supreme Court cases with the California law as declared in the California cases.

In Oregon, state law does not recognize riparian rights. California, however, does recognize riparian rights. Hence, if the rights of the United States in regard to its reserved lands must be determined in accordance with local custom, laws, and decisions of courts, it follows that the United States as a property owner in California is entitled to riparian rights just as all other property owners are entitled to riparian rights.

The error made by the SWRCB stems from the fact that the Desert Land Act and its predecessor statutes operate much differently in California from the way they operate in other states that do not recognize riparian rights. In such other states, unless some implied reservation of water rights can be found—as in *Federal Power Com. v. Oregon*—the United States has no water rights in regard to its reserved lands because all water rights must be acquired by appropriation. (That was Justice Douglas' argument.) In California, however, all property owners have riparian rights because of the adoption of the common law of England in regard to riparian rights. In *California Oregon Power Com. v. Beaver Portland Cement Co.,* the United States Supreme Court was critical of the California decisions and the language suggests that Congress intended to impose upon the western states a system of water law based on appropriation only, 295 U.S. at 160-161. But the later cases have retreated from this extreme view and have concluded that the United States as a property owner of its reserved lands is entitled to water rights in accordance with local law, customs, and decisions. In California, that local law embraces the law of riparian rights as that law has been developed in the California cases in regard to private land owners. The SWRCB has pointed to nothing in any legislation remotely suggesting a Congressional intent that the United States as a land owner of its reserved lands is *not* entitled to the same water rights that all other land owners in the state are entitled to.

If it is necessary to conceptualize the way the Desert Land Act operates in California, Hutchins' explanation adequately does so. That is, in California the riparian right is not extinguished or separated from the land in the public domain except to the extent

that appropriators validly appropriate the water thereon while it remains public domain. *Hutchins, the California Law of Water Rights* 56, 204. See *Palmer v. RR Commission* (1914) 167 Cal 163, 168-169. If, as argued by SWRCB at oral argument, riparian rights once severed from the land cannot be reattached (see *Rancho Santa Margarita v. Vail* (1938) 11 Cal.2d 501, 529), obviously a United States patent to land in the public domain could not give rise to a riparian right because, under the theory stated in *California Oregon Power* and argued by SWRCB, the riparian right was severed and reserved by the United States. But, in California, the patent does grant as part of the land a riparian right. It can do so only if in theory the riparian right is still held by the United States as part of the land. And this is what the California Supreme Court has repeatedly stated. See e.g., *Palmer v. RR Commission* (1914) 167 Cal 163, 168.

This court, therefore, concludes that, because all property owners in California are entitled to riparian rights, the United States as a property owner of its reserved lands is also entitled to the same riparian rights. The court therefore rejects the findings and order of the SWRCB to the extent that they do not allow the claim of the United States for an unexercised riparian right.

In the recent case of *In re Waters of Long Valley Creek Stream System* (1979) 25 Cal.3d 339, the California Supreme Court discussed the problem of unexercised riparian rights in the context of a stream system adjudication. The Supreme Court there held that when the SWRCB adjudicates the rights to the use of the water in a stream system, it is authorized to decide that an unexercised riparian claim loses its priority with respect to all rights currently being exercised. Moreover, said the court, "to the extent that an unexercised riparian right may also create uncertainty with respect to permits of appropriation that the Board may grant after the statutory adjudication procedure is final, and may thereby continue to conflict with the public interest in reasonable and beneficial use of state waters, the Board may also determine that the future riparian right shall have a lower priority than any uses of water it authorizes before the riparian in fact attempt to exercise his right". 25 Cal.3d at 358-359.

Accordingly, this court concludes that the exceptions of the United States should be sustained and that the judgment of this court under Water Code sections 2768 and 2769 should declare that the United States is the owner of the claimed riparian right in the Hallett Creek Stream System subsequent, however, in priority to the other claims adjudicated by the SWRCB.

The attorney for the United States shall prepare a judgment in accordance with this decision.

Dated: June 4, 1984

JOSEPH B. HARVEY
Superior Court Judge

A-52

APPENDIX E

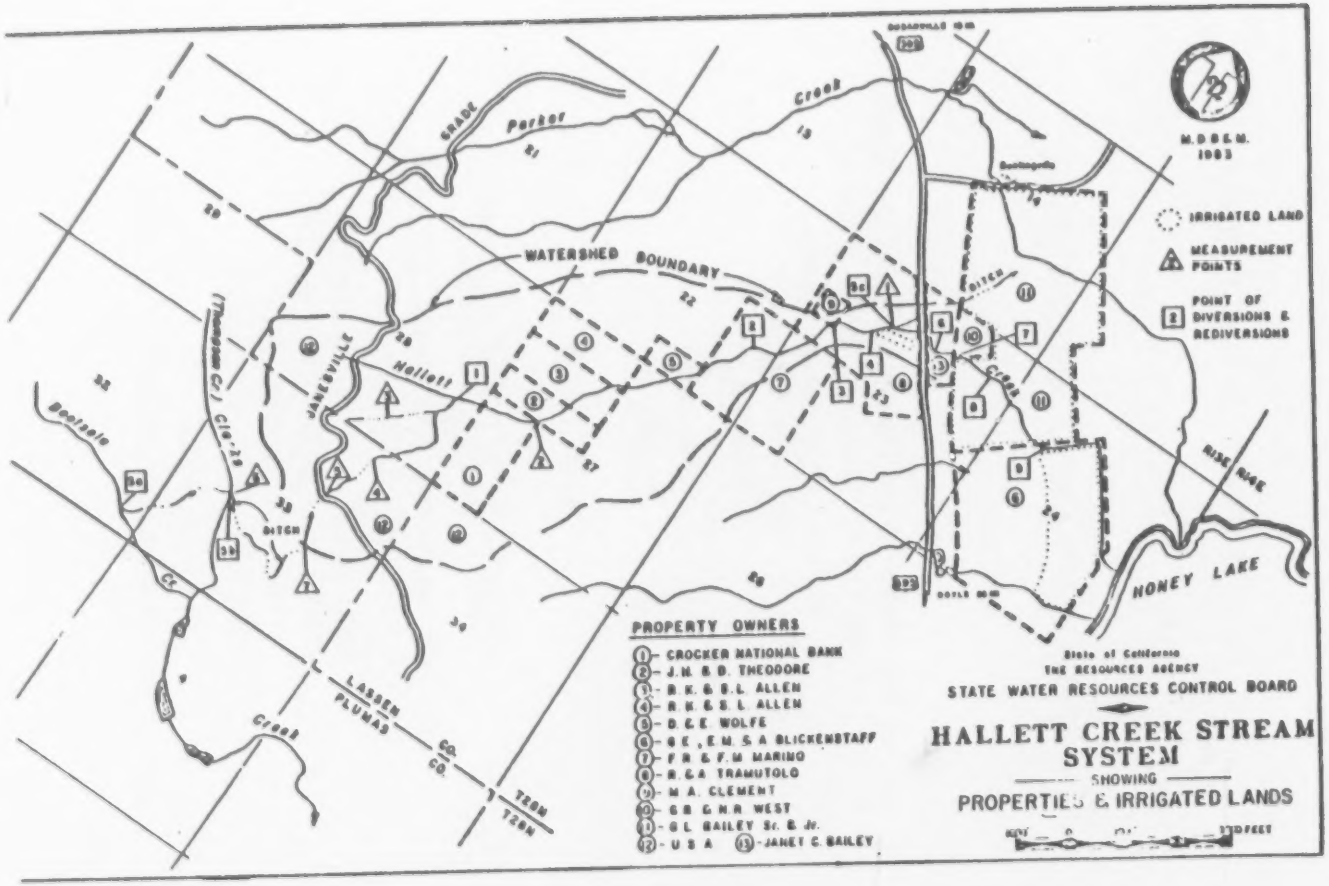
HALLETT CREEK ADJUDICATION

FINDINGS
AND
ORDER OF DETERMINATION

In the Matter of the Determination of the Rights
of the Various Claimants to the Water
of Hallett Creek Stream System
in Lassen County
California

1983

CALIFORNIA STATE WATER RESOURCES
CONTROL BOARD


M.D.B.&M.
1983
IRRIGATED LAND
MEASUREMENT POINTS
POINT OF DIVERSIONS & REDIVERSIONS
WATERSHED BOUNDARY
Parker Creek
Hallett Creek
Janesville
Honey Lake
Rice Rice
Ditch
Boatgate
LASSEN CO.
PLUMAS CO.
T28N
T27N
PROPERTY OWNERS
(1)- CROCKER NATIONAL BANK
(2)- J.M. & D. THEODORE
(3)- R.K. & B.L. ALLEN
(4)- R.K. & B.L. ALLEN
(5)- D.G.E. WOLFE
(6)- G.E., E.M. S.A. BLICKENSTAFF
(7)- F.R. & F.M. MARINO
(8)- R. & A. TRAMUTOLO
(9)- M.A. CLEMENT
(10)- G.R. & H.R. WEST
(11)- G.L. BAILEY Sr. & Jr.
(12)- U.S.A. (13)- JANET C. BAILEY
State of California
THE RESOURCES AGENCY
STATE WATER RESOURCES CONTROL BOARD
HALLETT CREEK STREAM SYSTEM
SHOWING
PROPERTIES & IRRIGATED LANDS

A-54

BEFORE THE STATE WATER RESOURCES CONTROL BOARD

OF THE STATE OF CALIFORNIA

HALLETT CREEK ADJUDICATION

In The Matter of the Determination of the Rights
of the Various Claimants to the Water of
Hallett Creek Stream System
in Lassen County
California

FINDINGS
AND
ORDER OF DETERMINATION
1983



State of California
George Deukmejian, Governor

State Water Resources
Control Board

Carole A. Onorato, Chairwoman
Warren D. Noteware, Vice Chairman
F. K. Aljibury, Member
Kenneth W. Willis, Member

* * *

Clinton L. Whitney, Executive Director

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FINDINGS

The State Water Resources Control Board held a hearing in this matter on October 26, 1982. The Board has considered all evidence admitted in connection with the hearing and all arguments submitted by the parties. Based on the hearing, the Board makes the following findings in addition to those set forth in the Report on Hallett Creek Adjudication adopted on February 24, 1982. To the extent that any of the findings herein conflict with statements in the Report on Hallett Creek Adjudication, the findings herein shall take precedence.

1. Under present circumstances all of the flow of Hallett Creek is placed to beneficial use during the summer except on rare occasions when high flows are present. Additional diversion and use of water from the creek would deprive present users of adequate water. In order to ensure that the waters of the Hallett Creek Stream System are put to beneficial use to the fullest extent of which they are capable, and to prevent the waste or unreasonable use or unreasonable method of use of water, as required by California Constitution, Article X, Sec. 2, only current users of water should presently be authorized to divert and use water from Hallett Creek Stream System.

a. As authorized in *In Re Waters of Long Valley Stream System*, 25 Cal.3d 339, 158 Cal.Rptr. 350 (1979), all unexercised riparian rights should be placed in priorities after all presently exercised water rights. Presently unexercised riparian rights should be determined as to scope, nature and priority only upon application to the Court or to the Board and activated only upon approval of the Court. They should receive priorities in the order of the date of their applications.

b. In order to prevent the waste or unreasonable use or unreasonable method of use of water in the Hallett Creek Stream System, the holders of riparian rights should be given an allotment rather than a flexible correlative share. This will make certain the rights of all holders of water rights to the Hallett Creek Stream System. As stated in *Long Valley, supra,* at p. 355, the Board is authorized under Water Code Section 2501 to define the scope of a riparian right in this type of proceeding.

2. a. Based on *United States v. New Mexico,* 438 U.S. 696, 98 S.Ct. 3012 (1978), the U.S. Forest Service (hereinafter Forest Service) is asserting reserved water rights only for the specific purposes of the reservation, and not for other purposes. The claimed purposes include firefighting and road watering during timber harvesting.

As the Court observed in *New Mexico* at p. 705, when "a river is fully appropriated, federal reserved water rights will frequently require a gallon-for-gallon reduction in the amount of water available for water-needy state and private appropriators." Thus, the reserved water right includes only the amount of water necessary for the purpose of the reservation. In the case of Hallett Creek, the policy of limiting the amount of reserved water to that needed for the purpose of the reservation is especially important, because the creek is fully used. Consequently, only the amounts needed for the specific purposes of the reservation should be allocated to the Forest Service under its reserved right.

b. Because of the holding in *New Mexico, supra,* the Forest Service is not claiming in this proceeding that it has reserved rights to water for enhancement of wildlife. Instead, it has requested that riparian rights be recognized for future wildlife enhancement use in the amount of 1,500 gallons per day at a specified spring (designated by the Forest Service as spring number 5) in Section 33, Township 28 North, Range 13 East. The Forest Service also claims riparian rights at its spring number 6 for future development for wildlife enhancement. However, development of spring number 6 is speculative, and so is not discussed further herein.

The Forest Service contends that riparian rights accrued to it when its lands within the watershed of Hallett Creek were withdrawn from the public domain for use as national forest lands. Its argument is based on interpretations of federal and state law. While it is well-settled that the Forest Service has reserved water rights which it may use for the primary purposes for which the forest lands were withdrawn from the public domain, the argument that it concurrently received riparian rights is novel.

The Forest Service argues that withdrawal of the federal lands from the public domain for National Forest purposes changed the status of federal water rights on these lands, giving them the same water rights as land transferred to private parties. In California a riparian right accrues upon passing of land from government to private ownership. The Forest Service argues that reservation of government lands from the public domain for forest use is a parallel type of transfer which likewise results in accrual of a riparian right, at the time of reservation. This contention is made notwithstanding that the forest land acquires federal reserved water rights not available to privately held lands and that it can be returned to the public domain by a federal action [presidential proclamation] similar to the one by which it was reserved.

Recent decisions of the United States Supreme Court make it clear that state water laws control the water rights of the United States on federal land, except to the extent that federal reserved water rights attached to these lands. In both *California v. United States,* 438 U.S. 645, 98 S.Ct. 2985 (1978) and *United States v. New Mexico,* 438 U.S. 696, 98 S.Ct. 3012 (1978), the Supreme Court emphasized that the Congress has consistently and repeatedly deferred to state water law regarding the water rights of the United States.

In arguing that it has riparian rights, the Forest Service states that in *Federal Power Commission v. Oregon,* 349 U.S. 435, 75 S.Ct. 832 (1955), the Supreme Court held that the Acts of July 26, 1866, and July 9, 1870, and the Desert Land Act of 1877 do not apply to lands and waters reserved from the public domain. The relevance of this statement is unclear. If the Forest Service is saying that it has a *federally* created riparian right to water on its lands, its argument is inconsistent with the *New Mexico* decision, *supra,* because in that case the Court made it clear that state water laws control water rights on federal land, including reserved lands, except to the extent that water is reserved. Thus, the Forest Service can reasonably be arguing only that no federal law precludes the state from recognizing a riparian right on reserved lands.

Since state laws govern whether the United States has a riparian right and the purpose to which any riparian right can be placed, we review state law on this subject.

First the Forest Service notes in its brief that several California courts in construing the federal acts of 1866 and 1870 and the Desert Land Act of 1877 assumed that the United States has riparian rights in streams passing through or adjacent to federal lands. *See, Palmer v. Railroad Commission,* 167 Cal. 163, 168, 138 P. 997, 998 (1914); *Lux v. Haggin,* 69 Cal. 454, 10 Pac. 672, 722 (1886); *Duckworth v. Watsonville Water and Light Co.,* 170 Cal. 425, 432, 150 Pac. 58, 61 (1915); *Holmes v. Nay,* 186 Cal. 231, 199 Pac. 325 (1921). In these cases the statements regarding riparian rights were all dicta. Additionally, they were an attempt by California courts to construe federal statutory and common law, without the benefit of a federal court decision on point.

In *California Oregon Power v. Beaver Portland Cement Co.,* 295 U.S. 142, 55 S.Ct. 725 (1935), the United States Supreme Court construed the federal statutory and common law regarding water rights on federal lands. The court held as follows:

> "What we hold is that following the act of 1877, if not before, all nonnavigable waters then a part of the public domain because publici juris, subject to the plenary control of the designed states, including those since created out of the territories named, with the right in each to determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain. For since Congress cannot enforce either rule upon any state (citation omitted), the full power of choice must remain with the State." (Id, 55 S.Ct. at 731.)

Until the United States Supreme Court made this holding, it was unclear to the states whether state or federal water rights law applied on federal lands. The cases cited above assumed the existence of a federal common law of riparian rights, accorded under federal sovereignty. The *California Oregon Power* holding denied the existence of such a body of law and made it clear that the states are responsible for determining, under their own sovereignty, the types of water rights existing on federal land. In effect,

the court said that the United States had no federal riparian rights. Consequently, the dicta in early California cases do not advance the Forest Service's argument.

Second, riparian rights in California are recognized by virtue of being part of the common law of England adopted by California in 1850 when it was admitted to the Union. (*Lux v. Haggin,* 69 Cal. 255, 384, 387, 4 Pac. 919 (1884), 10 Pac. 674 (1886).) Under the common law, riparian rights are private real property rights. They arose from enclosure of public lands, restricting free access to the streams. Before private property existed, no riparian rights existed. Wiel, Third Edition Sections 692, 693, 724.

Third, riparian rights do not attach to lands held by the government until the land has been transferred to private ownership. *McKinley Bros. v. McCauley,* 215 Cal. 229, 9 P.2d 298 (1932); *Rindge v. Crags Land Co.,* 56 Cal.App. 247, 205 P. 36 (1922). The reservation of lands from the public domain does not have the characteristics of a patent to a private party. The lands may be returned to the public domain by proclamation without a transfer of ownership. (16 U.S.C. Section 473.) This impermanence raises the spectre of a riparian right which may attach and disconnect from the land repeatedly. Existence of such a transitory right would be incompatible with the riparian doctrine because the right, once it attaches, is part and parcel of the land. See Rogers and Nichols, *Water for California,* Vol. 1 Sec. 158 (2) 158(2), and cases cited therein.

Fourth, appropriative rights to take water from a stream on land owned by the government are senior to riparian rights on the same land after the land has been transferred to private ownership. See *McKinley, supra; Rindge, supra; Crandall v. Woods,* 8 Cal. 136, 143 (1857); *Osgood v. El Dorado Water and Deep Gravel Mining Co.,* 56 Cal. 571 (1880); *Jones v. Pleasant Valley Canal Co.,* 44 Cal.App.2d 798, 113 P.2d 289 (1941). If the government had exercisable riparian rights at the time of the appropriation, the appropriator theoretically would not in these cases have priority over a subsequent riparian patentee, because the riparian patentee would receive the riparian rights of the government. The government rights, if they were exercisable, would be senior to the appropriative rights. Thus, it would be

inconsistent with the rule of priority expressed in the above cases, making appropriative rights senior, for the United States to have exercisable riparian rights.

Fifth, if the Forest Service has riparian rights, it could, except in adjudicated areas, exercise its rights unexpectedly. It could exercise them to such an extent that other long-standing uses of water would be eliminated (approrpriations) or substantially reduced (reduction in correlative share of riparian right holders). These rights could in theory be used for purposes far beyond the primary purpose of the federal land reservation, rather than for the primary reservation purposes allowed under the federal reserved rights doctrine. The existence of a holder of riparian rights as large as the Forest Service on a steam would inject a great deal of uncertainty into the plans of other water users on the stream for continued use of a given amount of water. If, for example, the Forest Service administratively decided to put some of its land into farming or manufacturing, it could easily consume substantial amounts of water to the detriment of other, long-established water uses. Correlative shares of other riparians would be reduced, and direct diversion uses under appropriative rights, having a lower priority, likely would be eliminated or severely impaired. The affected water users, having commenced their uses in the reasonable expectation that they could continue their level of use, would likely have made substantial investments dependent on the availability of water. These investments would lose much of their value in the presence of a large upstream riparian.

The California courts have acted to promote certainty in the exercise of water rights. An early example of this policy is *Boehmer v. Big Rock Creek Irr. Dist.*, 117 Cal. 19, 26-27, 48 Pac. 908, 910 (1897). In *Boehmer*, the court considered whether certain tracts not adjacent to a stream, which had been patented to a private party by the United States, were riparian to a stream. The tracts in question were contiguous with other tracts also patented to the private party, adjacent to the stream and therefore riparian. The court held that the tracts not adjacent to the stream were not riparian. In reaching its holding, the court described with disapproval the consequences if the non-adjacent tracts were riparian, as follows:

> "If appellants' contention as stated in his belief were sound, it would follow that, if A. owned a tract of land upon a stream, his riparian rights which he acquired by the purchase of that tract would extend to all lands he might subsequently acquire, no matter from whom, nor under what circumstances his vendor obtained title, nor how distant from the stream, provided he owned all the land between the stream and the land so purchased."

The consequence of the *Boehmer* decision is that the correlative shares of riparian owners on a stream cannot be diminished because a wealthy neighbor buys land away from the stream, and appropriative rights cannot be decreased because of such purchases (this is sometimes called the "smallest parcel rule"). Certainty of continued availability of water is therefore promoted.

The policy of promoting certainty in water rights has been most recently emphasized by our Supreme Court in *In Re Waters of Long Valley Creek Stream System,* 25 Cal. 3d 339, 158 Cal.Rptr. 350 (1979). In *Long Valley,* the Board had adjudicated the water rights in the Long Valley Creek Stream System. The Court held that an unexercised riparian on the stream could be placed in a priority lower than all water users with rights currently being exercised, and could also be limited as to scope and nature of the right. The effect of this decision is that riparians who do not exercise their rights may be required to have approved an application to divert and use water before they can exercise their riparian rights. By this mechanism certainty in the water rights of active water users is promoted, as against inactive holders of rights. In discussing the uncertainty inherent in unrestrained exercise of riparian rights, the court made observations, as follows:

> "... the Legislature intended to grant the Board broad authority pursuant to the statutory adjudication procedure to define and limit the scope of a riparian's future right." (citing Water Code Section 2769. *Id.* Cal.Rptr. at 355.)

> "Uncertainty concerning the rights of water users has pernicious effects. Initially, it inhibits long-range planning and investment for the development and use of water in a

> stream . . . Uncertainty also fosters recurrent, costly and piecemeal litigation. *Id*, at 360.
>
> "Finally, uncertainty impairs the state's administration of water rights. 'Lack of knowledge of water use by non-statutory right holders affects decisions to grant permits, because the availability of water for appropriation and the existence and extent of other beneficial uses of water are uncertain. It also affects the ability of the Board to set meaningful terms and conditions to provide effective enforcement and protection of statutory water rights.' (citations omitted) *Id*, at 360.

For the Board now to find that the Forest Service has riparian rights on its reserved lands, in contradiction of what has been thought to be settled law, and upon which the plans of many downstream water users have undoubtedly been founded, would be contrary to the policy to promote certainty in water rights. It would inject confusion into the system of priorities among water users in California, threaten long-standing investments founded on the avilability of water, and contravene a rule of California water rights which has been accepted as settled law at least since the California Supreme Court's decision in *McKinley, supra.*

Sixth, assertion by the United States of an exercisable riparian right available for purposes other than those of the reservation, would be incompatible with the policy of the courts to leave adequate water for other users by limiting the amount of water taken by the United States for its withdrawn lands. See *United States v. New Mexico, supra,* at p.700, 98 S.Ct. at p. 3014.

Even if it were found that the Forest Service has riparian rights in the Hallett Creek watershed, two factors would impede the Forest Service's immediate exercise of such rights. First, the Forest Service has not been using water for the claimed riparian purposes of wildlife enhancement. Thus, if it has riparian rights, it is a holder of unexercised riparian rights. Under this adjudication the Forest Service would have to apply to exercise any riparian rights it may have, and upon approval of the application would receive a priority based on the date of its application.

Based on the foregoing discussion we find that the Forest Service has no riparian rights on the land for which it claims such rights in the Hallett Creek watershed. Use of water on the land in question for non-reserved purposes can, however, be properly made under an appropriation permit.

c. While the Forest Service lacks riparian rights, it may be able to obtain developed water rights to water from spring number 5. Any increased yield of water resulting from development of the spring may be developed water. To the extent that flow from the spring is developed water, it would not be part of the natural flow of Hallett Creek.

Authority exists that persons or entities who develop water obtain developed water rights by undertaking and completing the artificial works necessary to add the water to a stream or water source. (See *Water for California*, Vol. 1, Sections 264-267, by Rogers and Nichols, Bancroft-Whitney, 1967.) An owner of land who enlarges or develops a spring on his land, causing an increase in the spring's flow, has a right to the resulting increase in the flow. *Churchill v. Rose*, 136 Cal. 576, 69 Pac. 416 (1902). However, the developer does not have a right to injure other water users by developing the water. Thus, a developer who takes water from the underflow of a stream, thereby decreasing the stream's natural flow, may be enjoined if he infringes the prior rights of others. *Vineland Irrigation District v. Azusa Irigating Co.*, 126 Cal. 486, 58 Pac. 1057 (1899).

On the record in the present case, it is unlikely or speculative whether the Forest Service's development of spring number 5 will impair the rights of other prior water users in the Hallett Creek Stream System. First, it appears that any flow from the part of the watershed where spring number 5 is located may not reach the stretch of Hallett Creek where the other water users divert water, during the summer months when the flow is fully used. Second, no reliable evidence exists in the record that development of the spring would deprive other water users. While George Bailey, Jr. speculated that underground water which would emerge through the developed springs might cause a reduction in the flow of Hallett Creek, he offered no technical evidence showing that the stream's flow would be affected.

Since on the present record no developed water right can be confirmed, the Forest Service should be given the opportunity to explore whether it would be feasible to claim such a right and to apply for confirmation of the right at a later time in the same manner as an applicant to exercise an unexercised riparian right or an applicant for an appropriation permit.

d. If it is found that the Forest Service has a riparian right, less than the full quantity of water claimed by the Forest Service should be allocated. The Forest Service estimates the wildlife would consume approximately 300 gallons per day. However, it is requesting that it be allocated 1,500 gallons per day. It will use the water in a 300 to 500 gallon water trough close to the spring. The Forest Service has established no beneficial use for 1,500 gallons per day. It would be a waste and unreasonable use of water for the Forest Service to consume 1,500 gallons per day in order to provide 300 gallons per day for wildlife. Conservation can prevent these losses. Consequently, the Forest Service should limit its use to 500 gallons per day.

3. The Forest Service has abandoned its request for recognition of riparian rights for domestic campground use on its lands. Consequently, no water allocation is made and no riparian right is recognized for this use.

4. On Bailey's property, Hallett Creek has not run in the natural stream channel for many years. The Baileys have diverted the entire stream onto their ranch, and the stream channel has been overgrown with brush and trees and filled in with decomposed granite. From the Baileys' land, the water returns to Hallett Creek. For many years, Blickenstaff has received only the water which the Baileys have not used, which ran off the Bailey property.

If Blinkenstaffs, downstream, are allotted water in the same priority as the Baileys, their right will be treated as correlative with the Baileys, and will in practice require that the Baileys bypass water down the natural stream channel. Since the channel is overgrown and filled in, little of the bypassed water would likely reach the Blickenstaff property. This practice would result in a waste of water.

During the hearing, Mr. Blickenstaff said that he thought it would be fair for him to receive water from Hallett Creek under a priority such that Baileys would receive their full allocation before he received water, provided that the Baileys are allocated a set quantity of water. Since Blickenstaff has for many years received from Hallett Creek only the water which the Baileys did not use, this arrangement would not injure Blickenstaff, and would maintain a workable physical solution between the two landowners.

5. The land held by the Tramutolos has only about 3½ acres in irrigated orchard at this time rather than the 15 acres of irrigated land shown in the Report on Hallett Creek Adjudication. The alfalfa field has reverted to sagebrush and approximately half of the trees in the orchard are dead. Consequently, only the 3½ acres should be treated as having active riparian rights.

ORDER

NOW, THEREFORE, THE FOLLOWING ORDER IS adopted as the Order of Determination of the State Water Resources Control Board at a meeting duly called and held at Sacramento, California, this 21st day of July, 1983.

Dated: July 21, 1983

CAROLE A. ONORATO
Carole A. Onorato, Chairwoman

WARREN D. NOTEWARE
Warren D. Noteware, Vice Chairman

F. K. ALJIBURY
F. K. Aljibury, Member

KENNETH W. WILLIS
Kenneth W. Willis, Member

BEFORE THE STATE WATER RESOURCES CONTROL BOARD OF THE STATE OF CALIFORNIA

In the Matter of
DETERMINATION OF THE RIGHTS of the Various Claimants to the waters of HALLETT CREEK STREAM SYSTEM, LASSEN COUNTY, CALIFORNIA

History of Proceeding

This proceeding was initiated in accordance with the provisions of Section 2525 of the Water Code of California pursuant to a petition, duly filed with the State Water Resources Control Board (hereinafter referred to as the Board) on August 31, 1976, requesting a determination of the rights of the various claimants in and to the use of waters of Hallett Creek Stream System, in Lassen County, California.

Upon investigation, the Board found the facts and conditions to be such that the public interest and necessity would be served by granting the petition. On November 16, 1978, the Board granted the petition and thereafter, as required by law, duly gave notice of its action by publication of a notice of pendency that the Board would begin its examination of the stream system. The Board notified claimants of rights in and to the use of water of Hallett Creek Stream System that they would be required to make proof of their claims in the manner provided by law and that they should notify the Board of intention to file proofs of claim before January 29, 1979.

In accordance with Section 2551 of the Water Code the Board gave notice in writing to each person who expressed an intent to file proof of claim to the use of water that its representative would conduct a detailed field investigation of such person's use of water.

At the conclusion of the detailed field investigation, the Board provided by registered mail to each claimant or claimant's representative forms and a copy of the factual findings of the investigation, for use in preparing a proof of claim.

The Board's representative also investigated the water supply in the stream system. The facts were gathered along with the information from the investigation of use of water, assembled, filed and made of record with the Board.

The Board's observations, data, information, and measurements were set forth in Section I, Water Supply and Use of Water on Hallett Creek Stream System, of its Report on Hallett Creek Adjudication. The Board also prepared a map from the materials and information gathered during the course of the investigation. The map shows the course of the stream system involved in the proceeding, the location of each diversion of water therefrom and the land irrigated by the diverted waters. The map was prepared by the Board as the investigation progressed.

All proofs of claim which had been filed were assembled and an abstract was prepared, printed in accordance with provisions of the Water Code and, along with the Board's findings regarding the proofs of claim, was included as Section II of the Board's report. Section III of the report consisted of a preliminary Order of Determination.

The Board sent a copy of the report by certified mail to each claimant and each person not filing a proof of claim who appears in the report.

With each copy of the report, the Board enclosed a notice setting forth the times and places where for a period of twelve days proofs of claims, measurements, and other data collected by the Board during the proceedings would be open and available for inspection by all interested persons. The notice also set forth a date, at least 60 days after the date of mailing, prior to which objections to any portion of the Board's report could be filed. Three parties filed objections. The Board mailed copies of each objection to all parties against whom the objection was directed.

The Board notified by certified mail all parties affected by objections, of the time and place for the Board's hearing on the objections. On October 26, 1982 the parties appeared before the Board and presented testimony and evidence relative to the issues raised in the objections.

The Board has incorporated its determinations on the issues raised by the objections into this Order of Determination.

NOW, THEREFORE, IT IS ORDERED that the several rights in and to the use of water of Hallett Creek Stream System, in Lassen County, California, are determined and established to be as hereinafter set forth.

Definitions

1. "Water Code" means the State of California Water Code.

2. "Stream System" means the Hallett Creek Stream System. It includes Hallett Creek and its tributaries from their headwaters to the outflow into Honey Lake in Lassen County, California, and water in subterranean streams which flow in known and definite channels and which contribute to the Hallett Creek Stream System.

3. "Claimant" means a party who has filed a proof of claim of water right in and to the use of water of Hallett Creek Stream System, or who, having failed or refused to file such a proof of claim properly, has had his right determined pursuant to provisions of Water Code Section 2577.

4. "Directly apply to beneficial use" means the direct conveyance and application of water diverted to beneficial use without intermediate storage, except such reasonable regulatory storage as may be practiced for the purpose of creating a convenient head for irrigation or other beneficial use allowed herein.

5. "Natural flow" means such flow as will occur at the point in a stream from the runoff of the watershed which it drains, from springs and seepage which naturally contribute to the stream, and from waste and return flow from dams, conduits, and irrigated lands, as distinguished from water released directly from storage for rediversion and use, or water imported from another watershed which is released directly to the natural channel for conveyance to the place of beneficial use.

6. "Watershed" means the drainage area or region which contributes to the water supply of a stream or lake.

State Water Resources Control Board Map

7. The State Water Resources Control Board map, hereinafter referred to as SWRCB map, was prepared by the Board from surveys made in 1978 and 1979. It is entitled "Hallett Creek System, Showing Properties and Irrigated Lands, Lassen County, California, dated 1983" and is on file in this proceeding. The SWRCB map, comprising one sheet, is incorporated and attached herein.

General Entitlement

8. The claimants in this proceeding are entitled to divert water from the Hallett Creek Stream System from points of diversion described in Schedule 1 for use on their lands described under their respective names in Schedule 2. The parcels and the diversion points are also shown on the SWRCB map. The amounts allotted for each use by each claimant are set forth with their respective priorities in Schedule 3. The paragraph entitled "Seasons of Use" sets forth the periods of time during which each use of water may be exercised. Amounts allotted to irrigation are set forth in Schedule 3 in gallons per minute. The points of measurement of the amounts of water allotted shall be at the points of diversion from the stream system unless otherwise specified. Nothing herein contained shall, or shall be construed to, allocate to any claimant a right to divert from Hallett Creek Stream System, at any time, a quantity of water in excess of an amount reasonably necessary for his beneficial use, nor to permit him to exercise his right in such a manner as to unreasonably impair quality of the natural flow.

Priority Classes

9. The term "priority class" when used herein means a class of rights each of which is equal in priority and correlative in rights with all other rights of the same class appearing within the schedule, so that if sufficient water is available to supply only part of the entitlement of any specific priority class, said available supply shall be prorated in accordance with allotments in that priority class. No priority class is entitled to the use of any water until all rights of all priority classes with lower numbers have been

fully satisfied. Thus, within the same schedule, all rights of the Second Priority Class are inferior in priority and subordinate to all rights of the First Priority Class, but are superior in priority and entitled to full satisfaction ahead of the Third Priority Class. Claimants of rights for dormant riparian land are entitled to divert allotments under the appropriate priority class shown in Schedule 3, to their places of use shown in Schedule 1, through proposed points of diversion specified in Schedule 2 or as these may be provided by claimants in the future to divert water adequately for irrigation of said lands without interference with superior rights.

Pre-1914 Appropriations

10. George L. Bailey, Sr. and George L. Bailey, Jr. claim rights to water from Bootsole and Thompson Creeks, tributaries to the Feather River drainage, under a pre-1914 appropriation. Water is diverted by check dams and ditches (Diversion Points 5a and 5b, SWRCB Map) into the head of Hallett Creek (Measurement Point 5). The Hallett Creek channel serves as the conveyance system to a point about 800 feet upstream from the U.S. Highway 395 crossing at Diversion Point 5c where a weir diverts the flow, which originates in Thompson and Bootsole Creeks, into a ditch for irrigation of 200 acres. George L. Bailey, Sr. and George L. Bailey, Jr. are entitled to use all of the water from Bootsole and Thompson Creeks which enters Hallett Creek, less the conveyance losses. This does not constitute a determination of the validity of the right of George L. Bailey, Sr. and George L. Bailey, Jr. to divert water from Bootsole and Thompson Creeks.

The court should require George L. Bailey, Sr. and George L. Bailey, Jr. to install and maintain a measuring device at the head of Hallett Creek where the imported water is discharged into the Hallett Creek System at approximately the same location as Measuring Point 5 which is shown on the State Water Resources Control Board map. They should also be required to install a measuring device at Diversion Point 5c to measure water diverted from the Hallett Creek channel. The amount of water diverted at Diversion Point 5c should not exceed the amount passing through the upper measuring device.

Season of Use

11. Allotments for all purposes shall be for continuous use throughout the year.

Domestic Use

12. Domestic use is limited to water applied exclusively for household purposes, watering of domestic animals and irrigation of up to one-half acre of yard, garden and/or family orchard. All allotments in First Priority Class in Schedule 3 are solely for domestic purposes.

Irrigation and Stockwatering Use

13. Irrigation use is limited to the application of water for the purpose of meeting moisture requirements of growing crops. Use for stockwatering is limited to water required by commercial livestock. All allotments for present irrigation of riparian lands, or for irrigation of riparian lands where diversion facilities have been installed for such irrigation, and allotments for non-domestic (commercial) stockwatering are in Second Priority Class. Allotments for dormant riparian lands have not been quantified at this time although Paragraph 18 provides for future allocation. Stockwatering shall be accomplished by the livestock drinking directly from the stream except that watering troughs may be used if they are equipped with conduits to allow any surplus water diverted to return to the stream or if pumping installations are equipped with automatic turn-off devices.

Industrial Use

14. Industrial use is limited to the application of water in the culture and harvesting of timber including incidental domestic use, the building and maintenance of roads, sprinkling to allay dust, fire protection, operation of portable or semi-portable sawmills including operation and maintenance of appurtenant logging ponds, chippers and debarkers and the initial irrigation of timber plantings including Christmas tree stock. Holding ponds should be designed and constructed to prevent waste. The ponds should not collect water except during those periods when water is required for actual use.

Special Provisions

15. In Schedule 3 all uses of water for domestic purposes are allotted first priority rights in accordance with Water Code Section 106.

16. George Bailey, Sr. and George Bailey, Jr., are entitled to divert the entire natural flow of Hallett Creek at Diversion Point 8. When the amount diverted exceeds 409 gallons per minute all flow in excess of 409 gallons per minute shall be used on lands which readily drain toward Blickenstaff's Diversion Point 9.

17. Section 2, Article X of the California Constitution prohibits unreasonable use, unreasonable method of use or unreasonable method of diversion of water. Future use of water under unexercised riparian rights is unreasonable when supply is inadequate to satisfy the rights set forth in this decree and in any supplemental decree, and use should be allowed only when water is surplus to the decreed rights. Also, the use of unnecessarily large regulation ponds would be an unreasonable method of diversion, and should not be allowed.

Unexercised Riparian Rights

18. The Board recommends that the court include the following subparagraphs in a decree issued in this matter:

> (a) All claimants and other persons not named in this decree owning land riparian to streams in the Hallett Creek Stream System upon which they do not presently exercise riparian rights to the use of water, or upon which they do not exercise riparian rights to the extent planned for the future, have unexercised riparian rights to the use of water. However, any right that is not defined in this decree shall be defined and exercised only in accordance with the provisions of this paragraph.
>
> (b) Any person identified in subparagraph (a) above may apply to the court under paragraph 21 or to the Board under paragraph 19 for definition of a riparian right which is not defined in this decree or in any supplemental decree. If the court finds that such person proposes to exercise such right

diligently, reasonably and beneficially, the court shall define the right in terms consistent with such proposed reasonable beneficial use. Any riparian right defined pursuant to this paragraph shall be the subject of a supplemental decree and shall possess a priority as of the date of application to the court or to the Board, as the case may be.

(c) Riparian rights defined pursuant to this paragraph shall be subject (1) to all rights which are defined in this decree, including any supplemental decree, as said decree exists on the date of application to the court or to the Board by a riparian claimant, and (2) to any appropriative right initiated by application, in accordance with Part 2 (commencing with Section 1200) of Division 2 of Water Code, prior to the date of application to the court or to the Board by a riparian claimant.

Changes in the Exercise of Rights

19. The court should provide that any party who wishes to change or modify the exercise of his rights set forth in the decree may request the Board to investigate said change or modification. If the Board investigates a change or modification it shall notify all affected parties of its investigation and give them an opportunity to object to the proposed change. If any affected party objects to the proposed change or modification, the Board shall hold a hearing or other proceedings in lieu of hearing. After investigating, the Board shall file its report. The report shall determine whether the proposed change or modification is in accordance with applicable law and shall make a recommendation regarding change or modifications of the decree. The court shall, after reviewing and approving any changes or modifications of the decree recommended by the Board, enter such changes or modifications as a supplement to its decree. The Board shall be reimbursed for its expenses of such investigation. Proceedings on the apportionment of the expense shall closely conform with the provisions of Article 13, Chapter 3, Part 3, Division 2 of the Water Code, commencing with Section 2850. Nothing in this paragraph shall restrict any right which any person may have

under any statute or common law to change or modify the exercise of his rights set forth in the decree.

Water Rights Disputes in Watermaster Service Area

20. The court should require that, when the decree has been entered and when a watermaster service area is created in accordance with applicable laws, the watermaster shall distribute the water in accordance with the decree. If a water right dispute arises between users, the watermaster shall regulate those diversions as set forth in the decree and as necessary to settle the dispute. Any party who alleges that the watermaster is not regulating his water right in accordance with the decree may apply to the Board to investigate said allegations. The Board shall notify all affected parties of its investigation and give them an opportunity to respond to the allegations. If any affected party requests a hearing or other proceedings in lieu of hearing, the Board shall duly notice and schedule a hearing or other proceedings in lieu of hearing. Following its investigation, the Board shall file a report with the court. The report shall explain whether the watermaster has regulated the water right in accordance with the decree and shall set forth the Board's recommendation to the court for any change, modification, or clarification of the decree. Any change, modification, or clarification of the decree recommended by the Board shall be entered subject to court review and approval, as a supplemental decree. The Board shall be reimbursed for its expenses in connection with this paragraph. Proceedings on the apportionment of expenses shall closely conform with the provisions of Article 13, Chapter 3, Part 3, Division 2 of the Water Code commencing with Section 2850. Nothing in this paragraph shall restrict any right which any person may have under any statute or common law to seek enforcement of this decree or to seek any other relief.

Reserved Jurisdiction

21. The court should reserve continuing jurisdiction to review its decree and to change or modify the same as the interests of justice may require. The court should, in its discretion, exercise its continuing jurisdiction upon application of any party hereto, or

successor in interest thereto, or upon its own motion or the motion of the State Water Resources Control Board.

Effects of the Decree

22. The court should provide in the decree that:

> "Each and every claimant, his or her agents, successors, grantees and assigns, are hereby perpetually enjoined and restrained from doing anything in violation of the terms or provisions of the judgment and decree, and from diverting any water from the Hallett Creek Stream System as defined herein at any time in excess of a quantity reasonably necessary for, and actually applied to, reasonable beneficial use, under and by reasonable methods of diversions and use, and from doing anything, directly or indirectly, that will obstruct or interfere with any right of another adjudged and decreed herein."

23. The court decree entered in this matter should be conclusive and determine all existing rights in the Hallett Creek Stream System as defined herein.

24. The court decree entered in this matter should contain the following paragraph:

> "This judgment supersedes and modifies all inconsistent former judgments and decrees as to the rights to the flow of the Hallett Creek Stream System. However, this judgment does not supersede rotation or ditch agreements consistent herewith."

25. The court in the decree should require that permits or licenses to use water in the Hallett Creek Stream System initiated by application under provisions of the Water Commission Act or the Water Code shall continue to be administered by the Board as in other cases. If the Board revokes or approves changes in any permit or license pursuant to Chapter 10 (commencing with Section 1700), Part 2, of Division 2 of the Water Code and court review of such action is sought, the court shall in its discretion upon motion of any party to the Board's proceeding, enter a supplemental decree confirming the Board's action.

26. The court in the decree should require that any claimant who has failed to appear and submit proof of his claim as provided in Chapter 3, Part 3, Division 2 of the Water Code, shall be barred and estopped from subsequently asserting any rights heretofore acquired upon the Hallett Creek Stream System as defined herein, and has forfeited all rights to water heretofore claimed by him on said stream system other than as provided in the decree, unless entitled to relief under the laws of this State.

Statements of Water Diversion and Use

27. Unless excepted, all persons diverting water under water rights other than appropriative water rights initiated after December 19, 1914, are required to file Statements of Diversion and Use in accordance with Part 5.1 of Division 2 of the Water Code commencing with Section 5100. Exceptions include springs that do not flow off the property and stream systems which are regulated by a watermaster who files reports which meet the description set forth in Water Code Section 5100(g).

Developed Water Rights

28. The Court should provide in the decree that:

a. "The U.S. Forest Service may apply for confirmation of a developed water right at Spring Number 5 or 6 for wildlife enhancement. Such a right may be confirmed unless development of the water injures other water users in the Hallett Creek Stream System. (See Rogers and Nichols, *Water for California,* Vol. 1, Sections 264-267, (Bancroft-Whitney, 1967); *Churchill v. Rose,* 136 Cal. 576, 69 Pac. 416 (1902); *Vineland Irrigation District v. Azusa Irrigation Co.,* 126 Cal. 486, 58 Pac. 1057 (1899).) This order is not to be construed as recognizing any water right from spring number 5 for wildlife enhancement at this time.

b. "Before the U.S. Forest Service takes any water claimed to be developed, it shall apply to the Board or the court for a modification of this order, to quantify its right to the developed water, determine that the increased water produced by the spring is correctly characterized as devel-

oped water, and determine that by taking the increased flow, the U.S. Forest Service will not injure the downstream holders of water rights. In applying to the court or the Board, the U.S. Forest Service shall use the procedure set forth in paragraph 18 or 19 of this order."

SCHEDULE 1

DESCRIPTION OF PLACES OF USE OF WATER FROM HALLETT CREEK STREAM SYSTEM

Owner	Use	Acres	Subdivision	Section T28N, R13E, MDB&M
Bailey, George L., Jr. & Sr.	Irrigation	12.1	SW¼	13
	Irrigation	1.3	SE¼	14
	Irrigation	66.1	NW¼	24
	Irrigation	72.5	NE¼	23
Blickenstaff, A. G. & B. C.	Irrigation	100	NW¼, NE¼ & SE¼	24
Clement, M. A.	Domestic		SW¼ of NW¼	23
Marino, Frank	Irrigation	0.75	NW¼ of SW⅛	23
Tramutolo, Richard & Alice	Irrigation	3.5	NW¼	23
USDA Forest Service	Industrial		E½ of SW¼	27
	Firefighting		S½	28
			NE¼	28
			N½	33
			NW¼	34
West, George G. & N. R.	Stockwatering		NW¼ of NE¼	23
Bailey, J. C.	Domestic		Portions of NE¼	23

DESCRIPTION OF PLACES OF USE OF WATER FROM BOOTSOLE AND THOMPSON CREEK STREAM SYSTEM

Bailey, George L., Jr. & Sr.		103	SW¼	13
		97	SE¼	14

SCHEDULE 2
LOCATION OF POINTS OF DIVERSION

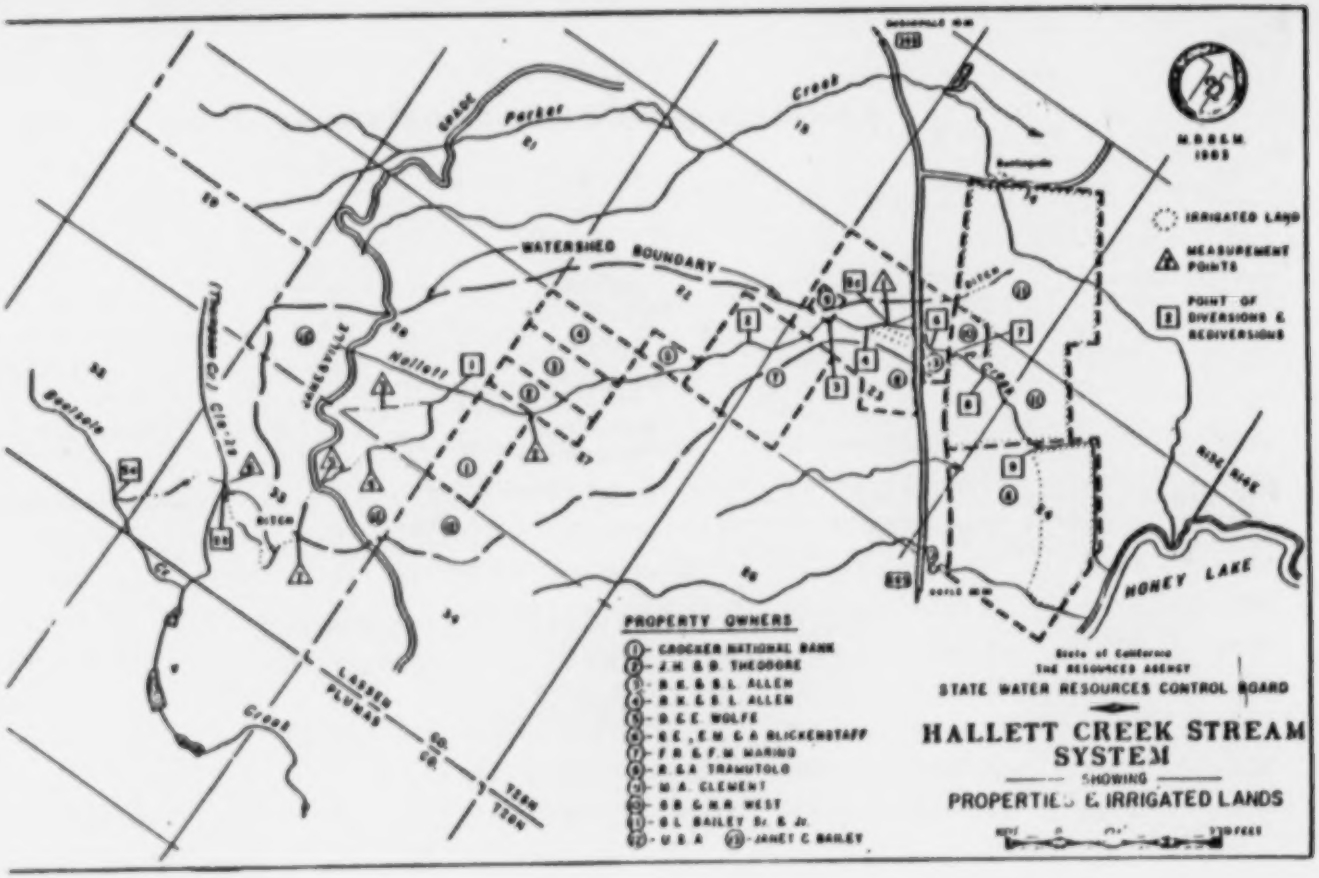
Name of Diversion System	Diversion Number on State Water Resources Control Board Map	LOCATION OF POINT OF DIVERSION WITHIN T28N, R13E, MDB&M			
		Legal Subdivision In Which Diversion Occurs	Reference Corner for Distance and Bearing	Bearing From Reference Corner	Distance From Reference Corner (In Feet)
U.S. Forest Service, springs	1	E½ of SW¼ Section 27, & portions of Sections 28, 33, & 34	SE Corner Section 27	N20°E	2000
Marino, wood check dam	2	NE¼ of SE¼ Section 22	SE Corner Section 22	N22°W	1800
Clement, diversion	3	SW¼ of NW¼ Section 23	NW Corner Section 23	S22°	2250
Tramutolo, earth check dam	4	SE¼ of NW¼ Section 23	NW Corner Section 23	S45°E	2350
Bailey, earth check dam	5a	SE¼ of SE¼ Section 32	SE Corner Section 32	N40°W	800
Bailey, earth check dam	5b	NE¼ of SW¼ Section 33	SW Corner Section 33	N45°E	2750
Bailey, concrete box check dam	5c	SE¼ of NW¼ Section 23	NW Corner Section 23	S57°E	2400
Bailey, J. C. diversion	6	NW¼ of NE¼ Section 23	NW Corner Section 23	S08°E	3500
West diversion	7	NW¼ of NE¼ Section 23	NW Corner Section 23	S73°E	3800
Bailey, check dam	8	NE¼ of NE¼ Section 23	NE Corner Section 23	S38°W	1200
Blickenstaff, sump portable pump	9	NW¼ of NW¼ Section 24	NW Corner Section 24	S68°E	2800

SCHEDULE 3

ALLOTMENTS TO VARIOUS CLAIMANTS FROM HALLETT CREEK STREAM SYSTEM

Name of Claimant	Diversion Number on SWRCB Map	Use	Area Irrigated in Acres	FIRST Priority (Gal/Day)	SECOND Priority (Gal/Min.)	THIRD Priority (Gal/Min.)
United States Forest Service	1	Industrial Firefighting			95,000 gal/annum	
Marino	2	Irrigation	0.75		3	
Clement	3	Domestic		30		
Tramutolo	7	Irrigation Stockwatering	3.5		10	
*Bailey, G. L.	5a,b,c	Irrigation	200			
Bailey, J. C.	6	Domestic		30		
West	7	Stockwatering			0.5	
Bailey, G. L.	8	Irrigation	152		409	
Elickenstaff	9	Irrigation	100			371

* All available water from Bootsole and Thompson Creeks from pre-1914 appropriation.


WATERSHED BOUNDARY
Hallett
Honey Lake
Creek
Parker
Boulevard
Lassen
Plumas
Co. Co.
T30N
T29N
IRRIGATED LAND
MEASUREMENT POINTS
POINT OF DIVERSIONS & REDIVERSIONS
PROPERTY OWNERS
1- CROCKER NATIONAL BANK
2- J.H. & D. THEODORE
3- B.K. & S.L. ALLEN
4- B.K. & S.L. ALLEN
5- D.G.E. WOLFE
6- G.E., E.M. & A. BLICKENSTAFF
7- F.R. & F.M. MARINO
8- R. & A. TRAMUTOLO
9- W.A. CLEMENT
10- G.B. & M.R. WEST
11- G.L. BAILEY Sr. & Jr.
12- U.S.A. 13- JANET C. BAILEY
State of California
THE RESOURCES AGENCY
STATE WATER RESOURCES CONTROL BOARD
HALLETT CREEK STREAM SYSTEM
SHOWING
PROPERTIES & IRRIGATED LANDS

Supreme Court, U.S.
FILED
JUN 14 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-2010

In The

Supreme Court of the United States

October Term, 1987

STATE OF CALIFORNIA, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California

BRIEF OF AMICUS CURIAE, FRIANT WATER USERS AUTHORITY, IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

A. B. Ewell, Jr.*
Gary W. Sawyers
*Counsel of Record
A. B. Ewell, Jr., A
Professional Corporation
83 East Shaw Avenue
Suite 203
Fresno, California 93710
Telephone: (209) 225-8300

Attorneys for Amicus Curiae, Friant Water Users Authority

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule No. 36, the Friant Water Users Authority, a California joint powers authority (the "Authority"), respectfully submits this brief amicus curiae in support of the petitioners, State of California, *et al.* Written consent to the filing of this brief has been granted by counsel for all parties. Copies

of all such consents have been filed with the Clerk of the Court.

The Authority was formed on October 24, 1985 pursuant to California's Joint Exercise of Powers Act (California Government Code § 6500 *et seq.*).[1] The Authority consists of 24 public districts,[2] each of which is a supplier of irrigation water received through the Friant Division of the United States Department of Interior Bureau of Reclamation's Central Valley Project (the "Central Valley Project"). The Friant Division of the Central Valley Project provides irrigation water to

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[1] Under California's Joint Exercise of Powers Act, two or more public agencies may by agreement jointly exercise any power common to those agencies for the purposes set forth in the agreement between them. When, as in the case of the Authority, the agreement between the agencies provides for the creation of an entity separate from the parties to the agreement, the resulting entity is itself a public agency separate from the parties to the agreement. See California Government Code §§ 6502, 6503, 6503.5 and 6507.

[2] The members of the Authority are the Alpaugh Irrigation District, Arvin-Edison Water Storage District, Atwell Island Water District, Chowchilla Water District, Delano-Earlimart Irrigation District, Exeter Irrigation District, Fresno Irrigation District, International Water District, Ivanhoe Irrigation District, Kern-Tulare Water District, Lindmore Irrigation District, Lindsay-Strathmore Irrigation District, Lower Tule River Irrigation District, Orange Cove Irrigation District, Pixley Irrigation District, Porterville Irrigation District, Rag Gulch Water District, Saucelito Irrigation District, Shafter-Wasco Irrigation District, Southern San Joaquin Municipal Utility District, Stone Corral Irrigation District, Teapot Dome Water District, Terra Bella Irrigation District and Tulare Irrigation District.

over one million acres of farmland in California's San Joaquin Valley.

The Authority was formed to provide for the joint exercise of powers common to each of the Authority's members to (i) operate and maintain dams, reservoirs, canals and facilities in order to acquire, divert, store and distribute water for beneficial use, (ii) provide information on water supplies, water distribution, and operation and maintenance problems affecting the members of the Authority, and (iii) preserve and protect the rights and benefits of the members of the Authority in and to the Central Valley Project. Consistent with its stated purposes, on August 19, 1986 the Authority entered into a contract with the United States Department of the Interior Bureau of Reclamation pursuant to which the Authority assumed responsibility for the operation and maintenance of the portion of the Central Valley Project consisting of the 151 miles of the Friant-Kern Canal.[3] As a result, the Authority is now responsible for the delivery of the waters conveyed in the Friant-Kern Canal system to all public districts utilizing that water, most of which are members of the Authority.

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[3] The Friant-Kern Canal is the larger of the two canals which deliver water stored behind Friant Dam in Fresno County. The Friant-Kern Canal, the 36 mile Madera Canal, Friant Dam and the reservoir behind Friant Dam (Millerton Lake, which has a capacity of 520,500 acre feet) constitute the principal facilities of the Friant Division of the Central Valley Project.

The rights to all waters delivered through the Central Valley Project, including those delivered by the Authority through the Friant-Kern Canal to the districts which ultimately distribute those waters to farmers, have been granted to the United States pursuant to permits to appropriate water issued by the California State Water Resources Control Board and its predecessors. *See* Decision 1485 of the California State Water Resources Control Board (August 1978), which sets forth the relevant permits held by the United States. Those permits were granted pursuant to the following Decisions of the California State Water Resources Control Board and its predecessors: Decision 1356 (February 5, 1970), Decision 1308 (July 18, 1968), Decision 1250 (June 1, 1966), Decision 1020 (June 30, 1961), Decision 990 (February 9, 1961), Permit Order 124 (September 10, 1959), Decision 935 (June 2, 1959), and Decision 893 (March 18, 1958). The United States therefore relies on appropriative rights obtained under California law through the long-standing and traditionally utilized state administered appropriation process in order to deliver water through the Central Valley Project.

As the agencies primarily responsible for the delivery of irrigation water to over one million acres of the nation's most fertile and productive farmland, the Authority and its members are vitally interested in the issues raised by this case because of the effects which the ruling of the California Supreme Court could have on their ability to obtain and distribute an adequate and reliable supply of water to lands within their service areas. Because those lands are dependent upon the

appropriated water delivered through the Central Valley Project for irrigation, the existence of "federal riparian rights" could significantly and adversely impact those lands by reducing the amount of appropriated water available for distribution and/or creating substantial uncertainty about water availability. The Authority therefore believes the opinion below poses a threat both to the water supplies on which it and its members depend, and to the viability of the farming operations which rely on deliveries of appropriated waters such as those delivered through the Central Valley Project.

SUMMARY OF ARGUMENT

By its judgment below, the California Supreme Court has abruptly recognized "federal riparian rights" as a component of California's water rights system, which has heretofore been premised (at least in part) on the absence of such rights. Through its strained and improper analysis of the relevant federal statutes, the California Supreme Court has ignored policy previously adopted by this Court and effectively superimposed a paramount federal riparian right on the existing water rights system in California. In so doing, the court below has disrupted the already delicate structure of water rights within California by suddenly recognizing riparian rights held by the federal government to virtually all waters in California's rivers and streams. This disruption is not justified by either legal analysis or policy considerations.

If not corrected by this Court, the California Supreme Court's improper decision below will adversely impact virtually all Californians. The exercise by the federal government of the enormous rights recognized by the decision below would significantly reduce the water supplies on which millions of Californians have come to rely, worsening an already critical water shortage problem affecting much of the state. Further, even the existence of those rights creates immense uncertainty with respect to California's scarce water resources, making long-range planning and management impossible. Amicus therefore urges the Court to grant the petition of the State of California for a writ of certiorari to the California Supreme Court so that this Court may have the opportunity to review and reverse the decision below.

Amicus is familiar with the petition for a writ of certiorari filed with this Court by the State of California, *et al.* and believes that the legal issues relevant to the Court's review of the petition are comprehensively and persuasively set forth therein. The Authority submits this brief amicus curiae in order to assist the Court in understanding certain policy considerations involved in this case and the potentially significant and adverse effects which the judgment below may have.

ARGUMENT

I

THE DECISION BELOW IGNORES POLICY CONSIDERATIONS PREVIOUSLY ADOPTED BY THIS COURT

In *United States v. Mexico*, 438 U.S. 696 (1978), this Court was called upon to determine the scope of the federal government's "reserved" water rights on lands reserved for national forest purposes. In determining that such reserved rights may be exercised only to further the primary purpose of a federal reservation, the Court recognized the significance of the issue before it by stating:

> "The quantification of reserved water rights for national forests is of critical importance to the West, where . . . water is scarce and where more than 50% of the available water either originates in or flows through national forests." 438 U.S. at 705.

In reaching its decision in *United States v. New Mexico*, this Court recognized that claims to water for use on federal reservations inescapably vie with other public and private claims for the limited amounts of water available in the West, and correctly adopted a policy that new federal claims to water in the arid West must be examined with great care and with a view to the potential impact of unregulated federal water rights. Now, by its decision below in the instant case, the California Supreme Court has determined that the federal government can accomplish through the exercise of a riparian right what this Court determined could not be accomplished by the federal government through the exercise of reserved rights – diversion of

water to lands reserved by the federal government (and indeed, to all federal lands) for purposes other than the primary purpose of those lands. In order to arrive at this result, the Court below has misinterpreted the applicable Constitutional provisions, as well as the relevant federal statutes (which, ironically, were enacted to further Congress' help goal of settling the West by adding stability in the area of water rights), and has completely ignored the fundamental policy considerations implicit in this Court's decision in *United States v. New Mexico*.

II

THE EXISTENCE OF A FEDERAL RIPARIAN RIGHT WILL CAUSE ENORMOUS DISRUPTION OF WATER RIGHTS AND UTILIZATION OF WATER RESOURCES IN CALIFORNIA

The decision below has the potential to create chaos among water users in California. Contrary to the position taken by the California Supreme Court, the United States, as both sovereign and the owner of approximately 48% of all land in California, simply cannot be considered to be "just like any other landowner" when determining its water rights. Virtually all of the land owned by the United States in California is riparian; much of that land is located in the state's mountains, in which most of California's rivers and streams originate. As a result, the federal government's riparian claims could extend to almost all waters flowing in rivers and streams in California. It is therefore clear that any significant exercise of riparian rights by

the federal government would impact the entire state by radically reducing California's already critically short water supplies.

Even if the federal government does not exercise its riparian rights to the fullest extent possible, the mere existence of such rights injects enormous uncertainty and instability into California's water rights system. In California, riparian rights are superior to all other water rights, including those on which almost all water users in California rely. Riparian rights may generally be exercised at will, without notice or review by any other party,[4] for *any* beneficial use on riparian lands. Consequently, even the existence of substantial

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[4] Under existing California law, in the context of a statutory water rights adjudication "unexercised" riparian rights may be determined to be of lower priority than appropriative rights and may be exercised only after quantification by the California State Water Resources Control Board. *In re Waters of Long Valley Creek Stream System*, 25 Cal. 3d 339 (1979). In its decision below, the California Supreme Court relied on the State's power to so prioritize and quantify "unexercised" riparian rights to mitigate the potentially drastic effects of its recognition of riparian rights held by the federal government. Unless the court below intended to expand the authority of the California State Water Resources Control Board, such reliance requires that all of the federal government's riparian rights be both deemed "unexercised" and subjected to a statutory adjudication. Unfortunately, it is not at all clear when riparian rights in California are deemed to be exercised (and therefore paramount to all other water rights). Further, while the instant case arises as the result of a statutory adjudication, it is foreseeable that the federal government will make substan-

(Continued on following page)

riparian rights which could be exercised at the whim of the United States for a limitless variety of uses prohibits effective planning and management of water resources. The decision below therefore makes it impossible for any California water user to rely upon water supplies which, even prior to that decision, were at best unpredictable. The creation of new uses for water on federal lands, changes in the White House, or even revisions of policies within an administration, could result in substantial differences in the exercise of riparian rights vested in the federal government. The California Supreme Court has thus left the state's water users to guess as to when the vast riparian rights held by the federal government might be exercised and to what extent.

The decision below also creates substantial uncertainty as to *who* may exercise the federal government's riparian rights. For example, it is possible that holders of special use permits issued by the Bureau of Land Management for federal lands and holders of licenses granted by the Federal Energy Regulatory Commission might be allowed to exercise those rights. The decision below also leaves open the issue of whether federal riparian rights may be exercised in connection with

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(Continued from previous page)

tial claims under its riparian rights outside of statutory adjudications. The reliance by the California Supreme Court on the California State Water Resources Control Board to prioritize and quantify the federal government's riparian rights in a manner designed to foster reasonable and beneficial use of the state's scarce water resources is therefore misplaced.

Indian homelands, military reservations, ranger stations and numerous other federally-controlled facilities. Again, the California Supreme Court has seen fit to require California's water users to predict the future in order to manage one of the state's scarcest resources.

While the decision below will have profound effects on all water users in California, perhaps the most drastic impact will be felt by California's already trouble-plagued farmers. California's multi-billion dollar agricultural industry is by far the largest user of water in California, most of which would be subject to the exercise of riparian rights held by the federal government. Especially in the existing climate of economic uncertainty for farmers, a reduction in available water supplies, or even the possibility of such a reduction, will almost certainly result in the reevaluation by growers as to whether they wish to remain in the farming business. In addition, farmers would be required to develop alternative water supplies; unfortunately, for most California farmers the only alternative would be the costly pumping of groundwater from California's already critically overdrafted groundwater basins. It is predictable that many growers will elect to withdraw their lands from production rather than face the uncertainty and additional expense which accompanies unpredictable and/or fluctuating water supplies. The social, economic and environmental impacts of the decision below are therefore potentially enormous, both for California and for the nation.

CONCLUSION

The present case represents a serious and unjustified misapplication of the law which may prove devastating for all water users in California. It results in the disruption of California's long-standing system of determining water rights and allocating the State's scarce water resources in a manner which will result in the maximum beneficial use of those resources. Particularly hard hit will be California's farmers, such as those which are provided water by the Authority and its members.

Because of the potentially dramatic impact of the decision below on California's water users, as well as for the reasons presented by the State in its petition for a writ of certiorari, amicus respectfully requests that the Court grant certiorari in order to review and correct the decision below.

DATED: June 14, 1988

Respectfully submitted,

A. B. EWELL, JR.*
GARY W. SAWYERS
*COUNSEL OF RECORD
A. B. Ewell, Jr., A
Professional Corporation
83 East Shaw Avenue
Suite 203
Fresno, California 93710
Telephone: (209) 225-8300
Attorneys for Amicus Curiae,
Friant Water Users Authority

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October Term, 1987

STATE OF CALIFORNIA, *et al.*,
Petitioners

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents

On Petition for a Writ of Certiorari to the Supreme Court of the State of California

BRIEF OF AMICI CURIAE, ASSOCIATION OF CALIFORNIA WATER AGENCIES AND CALIFORNIA FARM BUREAU FEDERATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

*Janet K. Goldsmith
Edward J. Tiedemann
KRONICK, MOSKOVITZ,
TIEDEMANN & GIRARD
A Professional Corporation
770 L STREET, SUITE 1200
SACRAMENTO, CALIFORNIA 95814
Telephone: (916) 444-8920

Attorneys for AMICI CURIAE
ASSOCIATION OF CALIFORNIA
WATER AGENCIES AND CALIFORNIA
FARM BUREAU FEDERATION

*Counsel of Record

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INTEREST OF AMICI CURIAE

Pursuant to Rule 36 of the rules of the Supreme Court, the Association of California Water Agencies ("ACWA") and the California Farm Bureau Federation ("Farm Bureau") respectfully submit this brief amicus curiae in support of the petition for certiorari filed by the State of California and its State Water Resources Control Board. Written consent has been obtained from all parties and copies of such consents have been filed with the Clerk of the Court.

ACWA is a non-profit corporation established under California law. ACWA has as members over 350 public agencies which are responsible for supplying water for domestic, municipal, and industrial uses to eighty-five percent of California's population and for supplying irrigation water for agricultural purposes for approximately 7,000,000 acres. ACWA's members are concerned about the issues raised in this case because of the effects the decision below may have on their ability to assure adequate supplies of good quality water to meet the needs of the people of California.

Virtually all the water delivered by ACWA member agencies is obtained pursuant to appropriative rights which are, with rare exception, subordinate to riparian rights regardless of when the riparian right is first exercised. The "federal riparian right" newly recognized by the decision of the court below, and never before exercised in California, thus has tremendous potential for disruption of public water supplies and displacement of long established uses. The priority of the right, the absence of its prior exercise, and the vastness of the geography to which the right attaches together create an unprecedented threat of water supply interruption or unreliability that seriously concerns the public agencies responsible for water delivery to Californians.

The California Farm Bureau Federation is a non-profit corporation. Its membership is composed of about 90,000 voluntary dues-paying California families, through 56 local counties, organized into 53 county farm bureaus. It is the state's largest general farm organization, and is a member of the American Farm Bureau Federation, which is the nation's largest farm organization, consisting of about 3,500,000 member families from 49

states and Puerto Rico. The purpose of the Farm Bureau is to represent its members' interests on legislative, regulatory and judicial matters at the local, state and federal levels. Among those interests, and of a prime level of importance, is the availability and reliability of water supply for agriculture and related uses.

The new class of federal rights recognized by the Supreme Court in its decision below appears to change the priority of state granted rights. With nearly half of the state's land area under the control of the federal government, and about three-quarters of the state endowed with less natural precipitation than is necessary for present-day crop husbandry, the Farm Bureau anticipates substantial damage to its members' interests individually, and to the state's economy overall, as result of the decision, which it believes to be incorrect and unjustified.

SUMMARY OF ARGUMENT

For over a century, the administration and development of California's water resources proceeded on the assumption that the federal reserved right doctrine and the state administered appropriation doctrine marked the limits of the United States' rights to surface water for the vast tracts of federal land in the state. As a result, the people of California have developed sophisticated and interrelated water supply and distribution systems which take no account of potential riparian claims on federally held land.

The United States fostered or at least acquiesced in that assumption; until this case, it asserted no other rights. Congressional enactments have created and implemented a strong uniform federal policy of deference to

state control of water resource allocation and administration. Prior decisions of this Court have enforced that deference to state control. Now the California Supreme Court, based on its own interpretation of federal law, has suddenly created extensive new federal rights never before exercised. The belated awakening of this slumbering federal water giant threatens loss of state control over California water resources, jeopardizes the reliability of existing water supplies and frustrates coherent water resource planning throughout the state.

The California court's decision was legally unfounded, contrary to long established federal policy, and unnecessary to the accomplishment of federal purposes on government land. Amici believes that the legal issues arising from this case have been ably presented by petitioner State of California in its petition and need not be repeated here. This brief is submitted to acquaint the Court with the far-reaching and crippling impacts of the decision below on California water supply and water resource planning, and to demonstrate that recognition of federal riparian rights is unnecessary to the accomplishment of federal goals. ACWA and the Farm Bureau therefore urge that the Court grant the petition for certiorari to the California Supreme Court so that its judgment may be reviewed and reversed.

ARGUMENT

I

SUPERIMPOSING A PARAMOUNT FEDERAL RIPARIAN RIGHT ON THE ESTABLISHED WATER RIGHT SYSTEM THREATENS SERIOUS DISRUPTION OF CALIFORNIA'S WATER SUPPLY

Other than pueblo rights, riparian water rights are generally the paramount surface water right in California. They are not lost by non-use and, except in the rare adjudicated stream systems, their exercise automatically supplants water uses established under subordinate appropriative rights no matter how longstanding or important such uses may be. Unexercised riparian rights are thus a "trump card" in California water rights, which inherently affect California's water right administration and water supply planning with a degree of uncertainty. Even the limited degree of uncertainty in water rights occasioned by privately held riparian rights has been labelled "pernicious" by the California Supreme Court. In Re Waters of Long Valley Creek Stream System, 25 Cal. 3d 339 (1979). The degree of uncertainty and instability threatened by the recognition of federal riparian rights, however, is geometrically greater.

The United States holds nearly half the lands in California. Much of that land is located in the mountainous regions where the state's water supplies originate and in the southern and eastern desert areas where water is scarce. Federal lands are located both upstream and downstream of the hundreds of reservoirs and thousands of diversions which serve the needs of California's large population. In either location, federal riparian claims would threaten disruption of California's water supply and distribution system. Upstream uses would render the water physically unavailable while downstream demands would make the flows legally unavailable for satisfaction of appropriative rights.

The potential uses to which federal riparian right water might be devoted vary widely. In addition to instream flows for fish and wildlife maintenance, the potential federal uses include domestic and recreational uses at

campgrounds, resorts, ranger stations and military bases, hydroelectric power generation, maintenance of valley wildlife refuges, and any other use beneficial to the riparian federal land.

A federal riparian right, automatically paramount to appropriative rights,[1] could impair long developed public and private water supplies which are based on appropriative water right permits and licenses. In fact, it is only because federal riparian rights will impair existing water rights and supplies, that it was necessary for the United States to argue so strenuously that they be recognized; other wise the United States could obtain the water it claims to need simply by applying for appropriative rights, as it has already done in many instances.

The degree of uncertainty which a federal riparian right will engender cannot be compared to the uncertainty already inherent in the State's water right system due to the recognition of private riparian rights and federal reserved rights. Its exercise and impact would be far more unpredictable and unrestricted.

The purposes for which federal reserved rights may be exercised are more limited than riparian rights; federal reserved water rights can be used only for the primary purpose of the federal reservation. United States v. New Mexico, 438 U.S. 696, 702 (1978). Moreover, many federal reserved rights are subordinate to appropriative and pri-

---

[1] In an unadjudicated stream system, unexercised riparian rights are superior to existing appropriative rights. According to the judgment below, the only avenue for limiting the disruptive effect of a new exercise of a previously dormant riparian right is to prove that the new use is "unreasonable," See A-24, n.16, a difficult and uncertain undertaking in a state where the basis for a reasonableness determination has yet to be articulated. See National Audubon Society v. Superior Court, 33 Cal 3d 419, 447, n.28 (1983).

vately held riparian rights. In contrast, a federal riparian right could be used for any proper riparian purpose, regardless of its disruptive impact on other water users. The State Water Resources Control Board would be without jurisdiction to prevent or condition water use pursuant to such a right, unless the use was unreasonable or a streamwide adjudication of rights had been undertaken.

Privately held riparian rights are similarly much more limited in their impact on California's water resource picture than the asserted federal riparian right would be. As the Governor's Commission to Review California Water Rights Law found in 1978, most privately hald irrigable riparian land is already being irrigated, leaving little room for amplification of water use under such rights, See Final Report, Governor's Commission to Review California Water Rights Law, at p. 26 (1978). The same cannot be said of the potential for initiation of new water uses under a federal riparian right. Since there has heretofore been no such use, the future extent of such use is wholly unpredictable, and could be substantial.

In addition, the lands to which privately held riparian rights are appurtenant are far more limited in area than the lands to which a federal riparian right would attach. Privately held riparian rights are maximally appurtenant only to the original tract patented by the United States – tracts generally limited to no more than 160 acres per patent. Thus, even where a stream flows through a large landholding of irrigable acreage, the legally riparian lands are generally far more limited. By contrast, the federal lands for which the United States claims riparian rights are held in vast undivided chunks. The geographical limitation of use of riparian rights is thus expanded to encompass entire drainages and watersheds and be-

comes virtually no limit at all. Where the federal land embraces a stream and multiple tributaries, water from one or more tributaries could even be transported across divides for use in a distant drainage under claim of riparian rights. For these reasons, the instability resulting from recognition of a federal riparian right is different in kind and far greater in degree than the uncertainty inherent in a water right system that recognizes riparian rights in patented tracts.

If all of this uncertainty is suddenly interjected into California water law, those, such as ACWA's members, reponsible for supplying water to California's residents, industries and farms will have to reexamine the security of their present water supplies. Many of them may find it absolutely essential to develop standby sources of water in order to prevent interruptions in vital services which could be caused by the sudden exercise of riparian rights by the United States. Such development will have untold financial, social and environmental consequences.

California's currently developed water supplies are already strained under current uses. Groundwater is being overdrafted at an annual average rate of about two million acre-feet a year in order to meet current agricultural and municipal needs. Much of the state's undeveloped water supply has been placed in federal wild and scenic river status and is unavailable for development. Several cities have begun considering purchasing and retiring farmland in order to obtain more water. Inevitibly, any increase in federal water use under paramount rights will exacerbate water supply problems for the non-federal users, and will ultimately adversely impact the state's agricultural economy, either through loss of farmland or increased overdraft of groundwater supplies on which much of the state's farming and agricultural indus-

try relies. These are some of the pernicious effects which flow directly from the uncertainty in water rights created by the decision below.

II

RECOGNITION OF FEDERAL RIPARIAN RIGHTS IS INCONSISTENT WITH CONGRESSIONAL POLICY OF DEFERENCE TO STATE CONTROL OF WATER RESOURCES AND SERVES NO LEGITIMATE FEDERAL PURPOSE

The potential for the unpredictable and automatic disruption of settled water uses discussed above argues strongly against recognition of a federal riparian right; there are no such weighty policy considerations favoring such recognition.

Water for federal uses is available through the appropriation process established by Division 2 of the California Water Code. That process has long been utilized by the federal government, not only in California but throughout the West, to acquire needed water supplies without disrupting existing water allocations. While it may be administratively more burdensome for the United States to make individual applications than it would be simply to seize whatever water it desires, such a burden is consistent with the longstanding uniform federal policy of deference to state control of water resources. See, e.g., Desert Land Act, 43 U.S.C. Section 321; Federal Power Act, 16 U.S.C. Section 821; Federal Reclamation Act, 43 U.S.C. Section 383; McCarran Act, 43 U.S.C. Section 666; California v. United States, 438 U.S. 645 (1978).)

The extent to which the state administered appro-

priation doctrine is claimed to be inadequate to staisfy the water needs of the United States measures with precision the extent to which the exercise of a paramount federal riparian right is likely to impair existing water supplies. The greater the claimed inadequacy, the greater the future disruption of settled rights.

In-stream flows on federal lands are already protected under the state appropriative rights system. A proposed diversion which might impair in-stream values must be balanced by the State Water Resources Control Board against the public interest in maintaining those values and may be denied or appropriately conditioned on those grounds. California Water Code Sections 1243, 1243.5 and 1257.

Recognition of a federal riparian right would enable the federal government to ignore the State Water Resources Control Board's determination of the public interest of the people of California. Under its riparian right, the United States could independently enforce greater in-stream flows than those found by the State to be required by the public interest. Alternatively, it could deplete in-stream flows below the level which the state found necessary to protect the public interest. Moreover, because the initiation of use under a riparian right requires no state notification or approval, the United States could simply bypass all public interest consideration by the state and unilaterally determine the issue itself.

The federal government has recourse to judicial review of State Water Resources Control Board decisions with which it disagrees concerning the level of in-stream flow protection. There is no good policy reason that the United States' own judgment of the public interest in such sensitive water allocation matters should automatically prevail over that of the State Water Resources Control

Board, as would be the case if federal riparian rights are recognized.

Finally, if the United States is unable to obtain under the appropriative process or federal reserved rights the water supplies it considers essential to its needs, it has recourse to its eminent domain powers to acquire such supplies. Acquisition of water rights by condemnation is preferable to the exercise of a federal riparian right not only because condemnation compensates the holder of the acquired supply for his loss, but also because it allows the termination of the least valuable existing water use, not just the most junior use (which might, in fact, be the most valuable, economically and societally).

CONCLUSION

As can be seen from the above discussion, the only disadvantages theoretically suffered by the United States due to the absence of a riparian right are (1) the inability to oust existing uses on fully appropriated streams without payment of just compensation, and (2) the inability to disregard, or override, the state's determination of the public interest in balancing consumptive use and maintenance of in-stream flows of water in particular instances. Eliminating these "disadvantages" by recognizing a paramount federal riparian right would inject into California water rights administration and public water supplies an intolerable degree of uncertainty and instability, as well as a degree of federal intrusion into state water allocation decisions which is inconsistent with Congressional expressions of deference to state control and administration of its water resources.

Because of the potentially devastating impacts on California's water supply planning and allocation,

the Association of California Water Agencies and the California Farm Bureau Federation urge this Court to grant the requested writ of certiorari and to review the interpretation of federal law which underpins the decision below.

Respectfully submitted,

Janet K. Goldsmith
Edward J. Tiedemann
KRONICK, MOSKOVITZ,
TIEDEMANN & GIRARD
A Professional Corporation

Attorneys for Amici Curiae
Association of California
Water Agencies and California
Farm Bureau Federation

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STATE OF KANSAS

ROBERT T. STEPHAN
Attorney General of Kansas
JOHN W. CAMPBELL, Deputy
(Counsel of Record)
Office of the Attorney General
Second Floor, Kansas Judicial Center
Topeka, Kansas 66612-1597

STATE OF NEBRASKA

ROBERT M. SPIRE
Attorney General of Nebraska
2115 State Capitol Building
Lincoln, Nebraska 68509

(Continued on next page)

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

STATE OF NEVADA

BRIAN MCKAY
Attorney General of Nevada
Capitol Complex
Carson City, Nevada 89710

STATE OF NORTH DAKOTA

NICHOLAS SPAETH
Attorney General of North Dakota
State Capitol
Bismarck, North Dakota 58505

STATE OF OKLAHOMA

ROBERT H. HENRY
Attorney General of Oklahoma
112 State Capitol
Oklahoma City, Oklahoma 73105

STATE OF SOUTH DAKOTA

ROGER A. TELLINGHUISEN
Attorney General of South Dakota
State Capitol
Pierre, South Dakota 57501-5090

STATE OF WASHINGTON

KENNETH O. EIKENBERRY
Attorney General of Washington
Seventh Floor, Highway-License Building
Olympia, Washington 98504

STATE OF WYOMING

JOSEPH B. MEYER
Attorney General of Wyoming
123 State Capitol
Cheyenne, Wyoming 82002

QUESTIONS PRESENTED

1. Whether the United States constitutionally may assert riparian water rights held by ordinary landowners under state law.

2. Whether federal land laws that encouraged settlement of the arid West terminated any common law water rights held by the United States for its lands.

3. Whether the United States can assert common law riparian water rights for wildlife purposes on national forest land in light of this Court's decision in *United States v. New Mexico*, 438 U.S. 696 (1978).

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STATEMENT OF INTEREST OF AMICI CURIAE

Water is a vital resource. Laws governing its use are deeply rooted in the legal history of the United States. These laws are based on two legal theories: the riparian doctrine and the doctrine of prior appropriation.

The similarity to England of the climate and topography of the eastern states led early American colonizers to institute traditional English water laws and customs, based upon the riparian doctrine, as their state water law. Under this doctrine the sovereign held the equivalent of

water rights to navigable waters. Private land owners, as an incident of land ownership, could use water located on their land to the extent that the flow of navigable waters remained undiminished. Such water rights were known as riparian rights.

Under the riparian doctrine the strict protection of natural flow, which could severely restrict water use by riparian water right holders, evolved to allow reasonable use. Also, the definition of navigability changed. *See The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. 443 (1851); *Barney v. Keokuk*, 94 U.S. 324 (1876). One thing which remained constant was the fundamental common law principle that riparian water rights existed as an incident of land ownership. Today, the eastern states rely generally upon riparian water law. 1 WATERS AND WATER RIGHTS 29-36 (R. Clark ed., 1978 Supp.).

The history of the water law of the states lying west of the ninety-eighth meridian is markedly different than in the East. The single most important difference relates to climate and geography. Relatively slight precipitation has meant fewer water courses in the West, which in turn has increased the need to divert water to areas of use. These diversions may be made by non-riparian (non-adjacent) land owners for use on non-riparian lands, as long as water is put to beneficial use as defined by state law. By using laws based largely on the appropriation doctrine, western states were thus able to efficiently manage their water resources. The beneficial use requirement meant that water rights issued in prior appropriation states came to depend not on land ownership but on establishment of a water right under state statutory law. 1 HUTCHINS,

WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES 6-14, 159-179, 226-236 (1971 ed.).

The current water law in the western states continues to be based generally on prior appropriation principles. This law vests broad control in the states to manage their water resources. Frank Trelease, one of the most respected commentators on western water law, has written:

> "Modern state water codes superimpose a layer of administrative law on . . . property law. Rights are no longer created solely at the will of the appropriator; now the state must concur. Today's appropriator applies for a permit to construct the works and to use the water, and a state official or agency decides whether there is unappropriated water for the use and whether the use is beneficial. The state officials determine the amount of water needed for the use and oversee the construction of the works. Most important, a new requirement has been added: the state agency may deny the application if to grant the permit would be 'contrary to the public interest.' The agencies and the courts have developed this into a very important policy which has enabled them to control water use with surprisingly modern and sophisticated economic concepts . . . (Appropriative) water law is thus a planning tool, a guide to action, an aid to decision. [Citations omitted.]" F. Trelease, "Uneasy Federalism—State Water Laws and National Water Uses," 55 WASH. L. REV. 751, 754 (1980)

Some less arid western states which implemented the appropriation doctrine as their water law also recognized common law riparian water rights. These states, which border the Pacific Ocean (Alaska, California, Hawaii, Oregon, and Washington) or are part of the High Plains (Kansas, Nebraska, North Dakota, Oklahoma, South Dakota, and Texas), developed a dual water right system,

recognizing both common law riparian rights and statutory appropriative rights. Today these two doctrines have been integrated, in varying degrees, in these states. 1 W. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES 186-223.

Even before passage of these state laws, Congress deferred to local law for the regulation of water resources. This Court has noted:

> ". . . the doctrine of prior appropriation, linked to the beneficial use of the water, arose through local customs, laws, and judicial decisions. Even in th(e) early stage of the development of Western water law, before many of the Western States had been admitted to the Union, Congress deferred to the growing local law." *California v. United States*, 438 U.S. 645, 653, 654 (1978).

As western appropriation systems developed further and became more refined, Congress continued its deference. In the Mining Act of 1866, 14 Stat. 251 (1866), 43 U.S.C. § 661, Congress confirmed water rights for mining, agriculture, and other uses which had been acquired by private parties on public land under local customs, laws, and court decrees. In the Desert Land Act of 1877, 19 Stat. 377 (1877), 43 U.S.C. § 321, Congress declared that water rights in arid western lands depended upon the prior appropriation doctrine. By way of this Act, past and future appropriations of water on public lands which had been made pursuant to local procedures under state laws were re-confirmed. Indeed, as the amici states point out more fully later in this brief, Congress' intent in the passage of this Act was to sever the land and water estates in the public domain, and to direct that water rights be

established under state law pursuant to prior appropriation principles and independently of rights to land. This Court formally recognized such intent in *California-Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935).

This consistent and purposeful deference has existed because the federal government recognized the utility of state systems of water law. Such deference has been particularly important in the West where water is scarce, water related controversies are all too common, and large blocks of land are federally owned and controlled. Historically, Congress has included disclaimer clauses in major federal legislation with the potential to disrupt state water law. These clauses require federal officials and private individuals with delegated federal authority, to obtain water rights in conformance with state law. *See, e.g.*, Reclamation Act of 1902, 43 U.S.C. §§ 371-600e, 383; Federal Power Act of 1920 § 791a-828c, 821; and Water Conservation Act of 1939, 16 U.S.C. § 590y-590z-11, 590z-1(b)(2).

This Court's recent decisions related to western water law have reaffirmed the need to ensure predictability and certainty with respect to the administration of state water rights laws. For example, in *California v. United States, supra*, 438 U.S. 645, this Court held that Section 8 of the Reclamation Act required the United States to acquire water rights under state *appropriation* laws, except where such laws are inconsistent with "specific Congressional directives." 438 U.S. at 672-679. In the same term, the Court adopted a narrow definition of the scope of federal reserved water rights for national forests. *United States*

v. New Mexico, 438 U.S. 696 (1978). More recently this Court declined to reopen a settlement of water rights under state law which included Indian rights, even though the Indian tribe had not participated as a party in the suit which led to the original decree. *Nevada v. United States,* 463 U.S. 110 (1983). Also, this Court refused to augment the quantity of an Indian tribe's reserved water right for lands omitted in the original determination of those rights. *Arizona v. California,* 460 U.S. 605 (1983). Also, this Court put to rest a jurisdictional battle which has been waged for many years concerning which forum, state or federal, should be used to determine water rights in the West. The Court held in favor of the state forum. *Arizona v. San Carlos Apache Tribe,* 463 U.S. 545 (1983). These decisions recognized the need for finality in the allocation of water under state law.

These decisions not only underscore the importance of predictability in water resource management, particularly in the arid West, but also highlight the delicate balance which has been struck regarding such management. The California Supreme Court's ruling in the decision below creates a water right never before recognized nor intended by Congress or this Court. It thus disturbs this balance and runs contrary to this Court's recent emphasis on certainty with respect to western water law generally. More importantly, it misconstrues the incidents of federal land ownership. Further, it is at odds with this Court's ruling in *California-Oregon Power Co. v. Beaver Portland Cement Co., supra,* 295 U.S. 142. The effect is to allow the United States to circumvent the appropriation process, thus impairing California's ability to manage water resources. In so doing, the decision presents novel

interpretations of federal law which should be reviewed by this Court. The concerns of the amici states with the implications of the ruling lead them to urge that California's petition for writ of certiorari be granted.

ARGUMENT

I. THE UNITED STATES' PROPRIETARY WATER RIGHTS IN FEDERAL LAND[1] ARISE UNDER FEDERAL LAW, AND ARE LIMITED TO RESERVED WATER RIGHTS.

It is axiomatic that the federal government is one of limited and enumerated powers. These powers derive specifically from the provisions of the United States Constitution. The Constitution nowhere mentions "water," yet some federal powers enable the United States to engage in water-related activities. For example, the commerce power, U.S. Const., Art. I, § 8 has been interpreted to include "transportation" which, in turn, includes "navigation" *Gibbons v. Ogden*, 22 U.S. 1 (1824). The power to regulate navigation was expanded to include the power to control navigable waters. *Gilman v. Philadelphia*, 70 U.S. 713 (1866).

The California Supreme Court correctly noted in its opinion below that, "A close reading of United States Su-

[1]The references to "federal lands" in this brief refer to lands originally owned by the United States. While the incidents of ownership of all federal lands must be defined in the first instance by reference to federal law, those incidents may be different as between land originally owned by the United States and land acquired by the United States from a non-federal owner.

preme Court decisions involving water rights disputes between the states and federal government reveals that the court has consistently premised its holdings on sovereign rights, rather than proprietary interests, of the United States." California Petition for Writ of Certiorari, A-8, 9. The "sovereign rights," or constitutional powers, which have formed the basis for the creation of federal water rights are those contained in the Property Clause of the U.S. Constitution, U.S. Const., Art. IV, § 3, together with the Commerce Clause, U.S. Const., Art. I § 8. *See Cappaert v. United States,* 426 U.S. 128, 129 (1976). Because the federal government's power to own and control land is constitutionally derived, the United States is a unique property owner.

In its decision in the instant case, the California Supreme Court cited *Kleppe v. United States,* 426 U.S. 529 (1976), and *Camfield v. United States,* 167 U.S. 518 (1897), for the proposition that the proprietary rights of the federal government are precisely the same as those of ordinary land owners. In *Kleppe* this Court held that Congress has constitutional power under the Property Clause to enact legislation regulating wild horses and burros on public lands. In so ruling, the Court noted that Congress exercises the powers of both a proprietor and a legislature over the public domain.

Obviously, the sovereign or constitutional power exercised under the Property Clause is, in some respects, analogous to the rights of ordinary land owners. To recognize this, however, as the Court did in *Kleppe,* is not a determination that the property rights of the United States are exactly the same as the common law property

rights of ordinary land owners. The *Kleppe* decision was concerned with the power of the federal government to regulate with respect to public lands, not with the incidents of the government's land ownership.

Camfield v. United States held that Congress has the constitutional authority under the Property Clause to enact legislation prohibiting fencing on public lands. This authority, the Court reasoned, was analogous to the rights of ordinary land owners to exclude trespassers. In dictum, the Court stated that the United States may deal with its land ". . . precisely as a private individual may deal with his farming property." 167 U.S. at 524.

Again, there can be no argument that some of the federal government's rights are analogous to those of private landowners. However, because the property rights of the United States are defined by reference to federal law, such rights are inherently and undeniably different from those of ordinary land owners whose rights arise under state common law. Whether the federal government acts as a proprietor or a legislator it acts pursuant to its federal authority. Its property rights are based on federal law and have little to do with state common law. The key is the source from which the proprietary rights derive. The property rights of private owners derive from local common law. The property rights of the federal government, on the other hand, derive from federal law.

The California Supreme Court, in its opinion below, quotes the writings of the late Professor Frank Trelease. Professor Trelease wrote specifically of the authority of the United States under the Property Clause to establish water rights for federal lands. He stated:

> "Far more important are the areas, large in total, that the federal government owns as a proprietor, and upon which it exercises governmental functions. The United States is not an ordinary land owner. It has special powers and immunities with respect to its real property and its operations on it, not possessed by ordinary land owners. The special powers and immunities spring from the property clause . . . . [Citations omitted.]" F. Trelease Federal-State Relations in Water Law 42-43 (1971)

This Court has consistently looked to federal law, rather than local law, to determine the water rights which exist as incidents of federal land ownership. Furthermore, it has defined such incidents solely in relation to reserved water rights to meet primary purposes of federal reservations. It has further stated that federal law requires that, in the West, state appropriative water rights must be obtained for other reservation purposes. Federal reserved rights, discussed in more detail in a subsequent section of this brief, are the constitutional equivalent of common law riparian water rights recognized under state law. There is no federal legal basis, either in the Constitution or the federal law passed pursuant to it, which sanctions riparian rights for federal lands under state common law.

II. FEDERAL LAND LAWS, SPECIFICALLY THE DESERT LAND ACT OF 1877, "SEVERED" THE LAND AND PROPERTY ESTATES IN FEDERAL LAND.

In the latter part of the last century Congress enacted a number of federal land laws designed to entice U.S. citizens to "tame" the West by developing and inhabiting the public domain. These laws helped America

fulfill its "manifest destiny." They provided, for example, that an individual could acquire ownership of a tract of land by successfully developing a mining claim located on it. The Mining Act of 1866, 14 Stat. 251 (1866), 43 U.S.C. § 661. Another method of acquiring land ownership was through farming under the Desert Land Act of 1877, 19 Stat. 377 (1877), 43 U.S.C. § 321. Pursuant to this law individuals acquired land for payment of 25 cents per acre by "conducting water upon the same . . ." and successfully cultivating it. This Act specifically provided that the water used for irrigation must "depend upon bona fide prior appropriation." It went on to state that:

> ". . . all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not-navigable, shall remain and be held free for the appropriation and use of the public irrigation, mining and manufacturing purposes. . . ." 43 U.S.C. § 321.

This Court considered the significance of the language requiring surplus water to be "free for the appropriation and use of the public." It stated:

> "If this language is to be given its natural meaning . . . it effected a severance of *all waters* upon the public domain, not theretofore appropriated, from the land itself. From that premise, it follows that a patent issued thereafter for lands in a desert-land state or territory . . . carried with it, of its own force, no common law right to water flowing through or bordering upon the lands conveyed." *California Oregon Power Co. v. Beaver Portland Cement Co., supra*, 295 U.S. at 158 (emphasis added).

Thus, the effect of the Desert Land Act and, likely, the Mining Act as well, was to sever "*all* waters upon the

public domain" from the land in the arid western United States and territories. As a result of this severance, water on public land was "free for . . . appropriation" under state water law.

In the instant case the United States denies that the Desert Land Act severed the land and water estates in the West. It argues instead that the severance occurred on an ad hoc basis where land patents were perfected. Otherwise, the United States asserts, it retained common law riparian property rights. The California Supreme Court was persuaded by the United States' argument. It disregarded the *Beaver Portland Cement Co.* ruling because, it noted, that case dealt only with the rights of federal patentees, not the rights of the government itself. California Petition for Writ of Certiorari, A-18. However, the Desert Land Act stated that "*all* surplus waters"not actually appropriated by a patentee shall "remain and be held free for the appropriation and use of the public." This Court interpreted that language as severing all waters on the public domain.

The California Supreme Court cited *Federal Power Comm'n v. Oregon* in support of its conclusions. This Court there upheld a ruling of the Federal Power Commission granting a license for a power project to use non-navigable waters located on a federal reservation in Oregon. This was done notwithstanding the objection of the state, and others. One of Oregon's arguments was that its consent to the project must be granted because the Desert Land Act delegated to states the authority to regulate non-navigable waters within their borders. This Court responded "it is enough, for the instant case, to recognize

that these acts do not apply to this license, which relates only to the use of waters on reservations of the United States." 349 U.S. at 448. While this ruling offers some support for the California Supreme Court's ruling below, this Court subsequently changed its view concerning the relationship between the Desert Land Act and federal reservations.

In *United States v. New Mexico, supra,* 438 U.S. 696, this Court narrowly construed the reservation doctrine to apply only to the primary reservation purposes. Water "valuable" for secondary uses must, in the words of this Court, be "acquire(d) . . . in the same manner as any other public or private *appropriat(ion).*" 438 U.S. at 702 (emphasis added). This Court reached its holding after reviewing several Congressional statutes, including the Desert Land Act. It noted that these statutes substantiate the "inference" that the federal government must obtain water rights for secondary reservation purposes under state appropriation laws. Thus, the Court reached a conclusion which is consistent with the severance of land and water estates recognized in the *Beaver Portland Cement Co., supra,* 295 U.S. 142 decision. In so doing this Court implicitly modified its dicta in *Federal Power Comm'n v. Oregon, supra,* 349 U.S. 435, and in *Cappaert v. United States,* 426 U.S. 128 (1976), concerning the application of the Desert Land Act to lands reserved from the public domain, because the *New Mexico* opinion can be read harmoniously with the two earlier opinions only if such a modification is assumed. The amici states submit that this Court should review the instant decision to consider and clearly resolve the apparent conflict be-

tween the dicta in *Cappaert, Federal Power Comm'n v. Oregon,* and the holding of *New Mexico.* Further, the implication of these three rulings as it relates to this Court's ruling in *Beaver Portland Cement Co.* should be reviewed.

III. THE STATUTE UNDER WHICH THE UNITED STATES ASSERTS RIPARIAN WATER RIGHTS FOR WILDLIFE PURPOSES IN THE PLUMAS NATIONAL FOREST, THE ORGANIC ADMINISTRATION ACT OF 1897, HAS BEEN INTERPRETED BY THIS COURT TO PRECLUDE RECOGNITION OF RIPARIAN RIGHTS FOR WILDLIFE PURPOSES.

The federal lands which comprise the Plumas National Forest were reserved from the public domain under the Organic Administration Act of 1897. 30 Stat. 34, 16 U.S.C. §§ 473 *et seq.* This Act authorized the reservation of public lands for national forest service purposes. In *United States v. New Mexico, supra,* 438 U.S. 696, this Court held that no federal reserved water right existed under the Organic Administration Act for any of the secondary purposes for which the forest reservations were made. These include the "wildlife protection" purposes which the United States claims as the basis of its riparian water right in the instant case. This Court reached its conclusion based on a number of factors. One was the underlying tenet that restricting the reserved right to primary reservation purposes would augment the quantity of water available to western settlers. The Court noted ". . . Congress authorized the national forest system principally as a means of enhancing the quantity of water that would be available to the settlers of the arid West." 438 U.S. at 713. To recognize reserved water rights for other national forest service purposes, however important, would

have, "defeat(ed) the very purpose for which Congress . . . create(d) the national forest system." *Id.* at 711, 712.

The theory on which the reserved rights doctrine rests clarifies the Court's ruling in *New Mexico.* It is a constitutionally premised ". . . doctrine built on implication and . . . an exception to Congress' explicit deference to state water law in other areas." 438 U.S. at 715. The reserved rights doctrine was first established in *Winters v. United States,* 207 U.S. 564 (1908), and applied to Indian reservations. In *Arizona v. California,* 373 U.S. 546 (1963), it was extended to all federal reservations.

In the *Winters* case, this Court was also presented with the argument that the federal government held riparian rights as part of its ownership of federal land. This Court chose not to recognize such riparian rights, but opted instead to create federal reserved water rights for the Indian reservation in question. *Winters v. United States, supra,* 207 U.S. at 578. Indeed, one must infer from *Winters* that the implied reserved water rights doctrine would not have been deemed necessary if the government held riparian rights; that is, if the public land laws of the nineteenth century had not severed from federal land whatever riparian water rights the federal government once held. But this severance had taken place and the *Winters* Court therefore created the reservation doctrine as the basis for federal water rights.

In again asserting a riparian right in addition to reserved rights, the United State's claim in the instant case falls clearly outside of the scope of federal water rights as enunciated by this Court. Especially in light of this Court's holding in *New Mexico, supra,* 438 U.S. 696, it is

simply too late for the United States to assert a new common law water right as an incident of land ownership. This Court has specifically ruled that any rights other than reserved rights must be obtained under state appropriative water law.

To uphold the government's claim would be to compound the problems created for western water managers by the reservation doctrine. This is so because:

> "In the . . . West . . . claims to water for use on federal reservations inescapably vie with other public and private claims for the limited quantities to be found in the rivers and streams. This competition is compounded by the sheer quantity of reserved lands in the Western States, which lands form brightly colored swaths across the maps of these States." *New Mexico*, 438 U.S. at 699.

In part because of these problems, this Court chose to limit the extent of this "exceptional" doctrine to primary reservation purposes.

In the instant case, the United States asserts a nonreserved common law water right for exactly the same secondary reservation purposes for which this Court has explicitly declined to recognize a reserved water right. This Court has ruled that Congress intended to maximize the quantity of water available to settlers of the West, and specifically that Congress demonstrated no intent to reserve water for wildlife purposes. It is therefore difficult to imagine that the Congress intended for the United States to claim common law riparian water rights for those same purposes where such riparian rights have exactly the same effect as reserved rights; that is, to limit the quantity of water available to settlers in the West. It

appears that the United States simply refuses to recognize the reality of this Court's holding in *New Mexico*. The United States should not be allowed to circumvent Congressional policy and the rulings of this Court simply by modifying the name of the water right it asserts.

The California Supreme Court quoted this Court's language in *New Mexico* requiring that water for secondary reservation purposes be acquired by appropriation, and then asserted that the "principle of deference to state law logically extends to any water rights recognized under local law—including riparian rights." California Petition Writ of Certiorari, A-11. Such analysis utterly fails to recognize the differences between appropriative and riparian water rights. First, as explained earlier, a riparian right is the common law equivalent of a reserved right under federal law. It arises as a result of ownership of land, and no beneficial use is required. It is in these respects antithetical to an appropriate right.

With regard to appropriate rights the United States must stand in line with other appropriators. It must have its claims weighed according to public interest values which figure in the appropriation process, be bound by all appropriation laws and principles, and accept its position in priority with respect to other appropriators. The state's role in this process of defining and granting appropriative rights is active and assertive. With riparian rights on the other hand, the state exercises a much lesser role.

Given these differences, it is fair to assume that this Court in *New Mexico* chose its words carefully when it held that with respect to water "valuable" for secondary purposes, the United States must acquire it "in the same man-

ner as any other public or private *appropriator.*" 438 U.S. 702 (emphasis added).

To now hold otherwise would be to recognize an enormous block of heretofore unexercised riparian rights creating an automatic cloud over other water rights with which they interrelate. This would institute the same mischief this Court sought to avoid in its ruling in *New Mexico*. This Court should review the decision below to reaffirm that water necessary in the West for secondary purposes under the Organic Administration Act of 1897 must be acquired under the appropriation laws of the western states.

IV. THE RULING OF THE CALIFORNIA SUPREME COURT IN THE INSTANT CASE IS CONTRARY TO THE INTERESTS OF SOUND PUBLIC POLICY AND SHOULD BE REVIEWED AND REVERSED.

The ruling below raises significant federal statutory and constitutional questions. Also, it raises issues concerning the uniformity of the federal property rights throughout the Nation. Further, the state supreme court which issued the ruling is influential and its decision may serve as precedent for other state court rulings. This Court has never determined the full extent of federal property interests under the Property Clause. This issue of first impression is of critical importance and should be reviewed by this Court.

In addition, this case is important for a number of other reasons. It will limit the quantity of water available for currently unsatisfied needs in California. Further, it will cast a cloud of uncertainty on existing rights, since such rights may have to be reduced to supply water for previously unused federal riparian rights.

These difficulties are reminiscent of those associated with the federal reserved rights doctrine, particularly before *United States v. New Mexico, supra,* 438 U.S. 696. Few subjects have commanded more attention from legal scholars and more disdain from western state water managers than the reserved rights doctrine. The *New Mexico* decision was heralded by western state officials as a major victory because it limited the scope of the doctrine. The claims of the United States in the instant proceeding are precisely the same in effect as those disallowed by this Court as part of that doctrine.

The decision below will undoubtedly damage California's ability to efficiently manage that state's scarce water resources. The appropriation doctrine is a fundamental tool used by the state to manage and plan for efficient use of water. This is true throughout the West. Congress has realized the importance of state water resource management and has consistently deferred to state appropriative water law. *See, e.g., California v. United States, supra,* 438 U.S. at 653, 654; *United States v. New Mexico, supra,* 438 U.S. 698-705. The United States, as a matter of custom and comity, has participated in the appropriation process to the extent that it has been unable to assert reserved water rights under federal law. *See, e.g., United States v. New Mexico, supra,* 438 U.S. at 703, n.7; *California v. United States, supra,* 438 U.S. 645, 652. The decision below will permit the United States to circumvent the appropriation process in many instances. This will hamper effective water resource planning by state officials.

One additional concern of the amici states is that if the United States has riparian rights for its vast land

holdings, such rights may be asserted by individuals who derive delegated authority under federal statutes which effect water resource management in the West. Indeed, as California has pointed out in its petition for writ of certiorari, private hydroelectric power project applicants for projects located on federal lands have now asserted that the United States has "assigned" its riparian rights to them, and thus they need not comply with California's prior appropriation laws.

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CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court grant the petition for certiorari.

Respectfully Submitted,

STATE OF KANSAS

ROBERT T. STEPHAN
Attorney General of Kansas

STATE OF NEBRASKA

ROBERT M. SPIRE
Attorney General of Nebraska

STATE OF NEVADA

BRIAN MCKAY
Attorney General of Nevada

STATE OF NORTH DAKOTA

NICHOLAS SPAETH
Attorney General of North Dakota

STATE OF OKLAHOMA

ROBERT H. HENRY
Attorney General of Oklahoma

STATE OF SOUTH DAKOTA

ROGER A. TELLINGHUISEN
Attorney General of South Dakota

STATE OF WASHINGTON

KENNETH O. EIKENBERRY
Attorney General of Washington

STATE OF WYOMING

JOSEPH B. MEYER
Attorney General of Wyoming

(6)

No. 87-2010

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In the Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF CALIFORNIA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
ROGER J. MARZULLA
Assistant Attorney General
EDWARD J. SHAWAKER
ROBERT L. KLARQUIST
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the Property Clause of the United States Constitution precludes the federal government from holding riparian water rights under state law in state jurisdictions that recognize such rights.

2. Whether the Desert Land Act of 1877 and other nineteenth century statutes bar the United States from asserting state-law riparian water rights, with respect to lands reserved for national forest purposes, in state jurisdictions that recognize such rights.

3. Whether the Organic Administration Act of 1897 precludes the federal government from obtaining water rights pursuant to state law for wildlife management purposes.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the California Supreme Court (Pet. App. A1-A25) is reported at 44 Cal.3d 448, 243 Cal. Rptr. 887. The opinion of the California Court of Appeal (Pet. App. A28-A42) is reported at 187 Cal.App.3d 863, 232 Cal. Rptr. 208. The opinion of the California Superior Court (Pet. App. A43-A51) is unreported.

JURISDICTION

The judgment of the California Supreme Court was filed on February 18, 1988. A timely petition for rehearing was denied on March 16, 1988 (Pet. App. A27). The petition for a writ of certiorari was filed on June 8, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

STATEMENT

1. In 1978, the California State Water Resources Control Board (Board) granted a petition requesting a determination of water rights in the Hallett Creek Stream System in Lassen County, California (Pet. App. A69). The United States submitted various claims on behalf of the Department of Agriculture's Forest Service seeking confirmation of water rights for the Plumas National Forest. The government claimed federal reserved water rights for firefighting and timber harvesting purposes (*id.* at A59).[1] In addition, the United States sought confirma-

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[1] Federal reserved water rights are created where the United States reserves lands under circumstances where waters are needed to achieve the primary purposes for which the reservation was created. As this Court explained in *Cappaert* v. *United States*, 426 U.S. 128, 138 (1976):

> This Court has long held that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In so doing the United States acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators.

Such federal reserved water rights are wholly creatures of federal law—they are not dependent upon state law or state procedures. See 426 U.S. at 145. The implied-reservation-of-water doctrine, however, reserves only that amount of water necessary to fulfill the primary purposes of the reservation. In *United States* v. *New Mexico*, 438 U.S. 696 (1978), this Court held that the reservation of land for a national forest reserves waters only for "primary" national forest purposes; namely, " '[t]o conserve the water flows, and to furnish a continuous supply of timber for the people' " (*id.* at 707 (citation omitted)). The United States must obtain the water needed for "secondary" national forest purposes as recreation and wildlife "in the same manner as any other public or private appropriator" (*id.* at 702).

tion of a riparian water right, under California state law,[2] in the amount of 1,500 gallons per day from a designated spring for future wildlife enhancement purposes (*ibid.*).[3]

The Board recognized a federal reserved water right entitling the Forest Service to divert and use water for fire-fighting and timber harvesting purposes (Pet. App. A59, A83). It rejected, however, the Forest Service's request for recognition of its asserted riparian right, concluding as a matter of law that the federal government is not entitled to riparian rights for national forest lands (*id.* at A59-A66).[4] The Board further concluded that, if the United States could validly claim riparian rights, the federal government here would be a holder of an "unexercised" riparian right (*id.* at A65).[5] The Board ruled that the unexercised riparian right, if it existed, should be limited to 500 gallons per day (*id.* at A67).

2. The United States, joined by the Sierra Club, filed a notice of exceptions in California Superior Court urging

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[2] California state law recognizes both riparian water rights and appropriative water rights. See *National Audubon Society* v. *Superior Court*, 33 Cal.3d 419, 441-445, 658 P.2d 709, 724-727, 189 Cal. Rptr. 346, 361-364, cert. denied, 464 U.S. 977 (1983).

[3] The federal government also made a claim for an additional amount of water from a different spring, but that claim was dismissed by the Board as speculative (Pet. App. A59). The United States did not seek review of that ruling.

[4] While the Board gave various statutory and policy grounds for this conclusion, it did not, contrary to petitioner's assertion (Pet. 3), deny the claim in whole or in part on the ground that "the United States constitutionally does not have the same 'riparian' rights as ordinary landowners." See Pet. App. A61-A65.

[5] Under California law, the exercise of previously-unexercised riparian rights may be subordinated to existing exercised riparian and appropriative water rights. *In re Waters of Long Valley Creek Stream System*, 25 Cal.3d 339, 358-359, 599 P.2d 656, 668-669, 158 Cal. Rptr. 350, 362-363 (1979).

that the federal government was entitled to an unexercised riparian water right. The superior court agreed (Pet. App. A43-A51), concluding that "because all property owners in California are entitled to riparian rights, the United States as a property owner of its reserved lands is also entitled to the same riparian rights" (*id.* at A50). The State of California appealed, and the California Court of Appeal largely affirmed the superior court's decision (*id.* at A28-A42). The court of appeal stated that it could "discern no justification for holding that riparian water rights inhere in some lands, but not in others, based solely upon the identity of the owner of the land" (*id.* at A38) and concluded that "the United States may assert the same proprietary interests, including a riparian water right, that a private individual could assert" (*ibid.*). The court of appeal qualified its ruling, however, by declaring that the riparian rights held by the United States under California law are subject to defeasance by subsequent appropriators (*id.* at A40-A42). The court of appeal interpreted the Desert Land Act of 1877, ch. 107, 19 Stat. 377 (Desert Land Act), and two other nineteenth century federal statutes (Act of July 26, 1866, ch. 262, 14 Stat. 253; Act of July 9, 1870, ch. 235, 16 Stat. 218), as subordinating nonreserved water rights to water rights subsequently perfected under state law by non-federal entities.[6] Thus, under the court of appeal's ruling, the Forest Service could validly claim riparian rights under California law, but any such rights so recognized were subject to defeasance by subsequent water users.

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[6] The court of appeal stated: "Pursuant to the Act of 1866, 1870 and 1877, the United States holds unreserved water on its lands open for the free appropriation and use of the public and its riparian right must be regarded as secondary to all other approved uses" (Pet. App. A42).

3. The United States, California, and the Sierra Club all filed petitions for review in the California Supreme Court, which were granted. That court, in a unanimous opinion (Pet. App. A1-A26), affirmed in part the court of appeal's decision. The court held that the United States has riparian water rights under California law on lands reserved for national forest purposes and that those rights are no more defeasible than the riparian rights of other California landowners (*id.* at A1).

First, the California Supreme Court rejected California's contention that the Property Clause, U.S. Const. Art. IV, § 3, Cl. 2, disqualifies the United States from holding property rights created by state law (Pet. App. A8-A11). California had argued that because the United States exercises sovereign powers over its lands by virtue of the Property Clause, it is therefore precluded from claiming the state-law rights of ordinary landowners. The California Supreme Court, relying upon this Court's decisions in *Kleppe* v. *New Mexico,* 426 U.S. 529, 540 (1976), and *Camfield* v. *United States,* 167 U.S. 518, 524 (1897), concluded that the United States may, in addition to its sovereign prerogatives, exercise the common law rights of an ordinary proprietor under state law. The California Supreme Court found this conclusion to be buttressed by this Court's decision in *United States* v. *New Mexico,* 438 U.S. 696 (1978), which had emphasized the congressional policy of deferring to state law in matters concerning the acquisition of water rights. The California Supreme Court stated that while the *New Mexico* decision addressed only appropriative rights—the only type of water right recognized under New Mexico law—"the underlying principle of deference to state law logically extends to *any* water right recognized under local law—including riparian rights" (Pet. App. A11 (emphasis in original)).

Second, the California Supreme Court rejected (Pet. App. A11-A19) California's contention that the Desert Land Act and the predecessor statutes, as construed by this Court in *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U.S. 142 (1935), effected a relinquishment of all riparian rights of the United States. The California Supreme Court recognized that this Court's decision, which stated that a federal patentee had to look solely to state or local law to acquire water rights, neither held nor suggested that the federal statutes relinquished the federal government's riparian water rights in the lands which it had retained (Pet. App. A18). The California Supreme Court determined that neither Congress nor this Court has overruled the principle, "uniformly recognized" in state law, that the riparian rights inhere in federal lands "as surely as they inhere in private lands" (*ibid.*). The Court accordingly concluded that "under California law riparian water rights exist on federal lands located within the State of California" (*id.* at A19).

The court cautioned, however, that this conclusion does not mean that state-law riparian water rights claimed by the federal government are always superior to subsequent water rights claimed by other entities. Although the Desert Land Act and its predecessors did not *terminate* the federal government's interests in the waters on the public domain, it did *subordinate* those interests to the subsequent rights of entities claiming water under state or local law (Pet. App. A19). Hence, even though riparian rights attaching to the public lands still exist, such rights have no effect upon any party holding a valid, subsequent, state-recognized water right, be it riparian or appropriative in nature.

The court explained (Pet. App. A19-A22) that a different result obtains, however, when the federal lands in question are not public lands but, rather, lands that have

been withdrawn from the public domain and reserved for some particular purpose, such as a national forest. The Desert Land Act and its predecessors are, by their terms, applicable only to the "public lands" and not to "reserved lands" (*id.* at A19-A21, citing *Federal Power Comm'n* v. *Oregon (Pelton Dam),* 349 U.S. 435, 448 (1955), and *Cappaert* v. *United States,* 426 U.S. 128, 143-144 (1976)). Thus, those statutes do not subordinate the state-law riparian rights arising on reserved lands to subsequently-perfected competing claims. The California Supreme Court accordingly reversed the court of appeal's ruling that the state-law exercised riparian rights attaching to national forest lands are freely subject to defeasance by subsequent water claimants (Pet. App. A22).[7]

Finally, the California Supreme Court rejected as "unfounded" (Pet. App. A22) California's assertions that recognition of unexercised riparian rights in federal reserved lands would disrupt the settled rights of appropriators throughout California and impair the Board's ability to plan and manage the allocation of the state's water supply. The court pointed out (*id.* at A22-A25) that unexercised riparian rights in California, while they may not be abolished altogether, may be subordinated by the Board to all valid water rights currently being exercised. See *In re Waters of Long Valley Creek Stream System,* 25 Cal.3d 339, 599 P.2d 656, 158 Cal. Rptr. 350 (1979). Moreover, " 'the Board may make determinations as to the scope, nature and priority of the right that it deems reasonably necessary to the promotion of the state's interest in fostering the most reasonable and beneficial use

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[7] The court similarly rejected (Pet. App. A22) California's contention that the Organic Administration Act of 1897, 16 U.S.C. 473 *et seq.*, precluded the United States from asserting riparian rights with regard to national forest lands.

of its scarce water resources' " (Pet. App. A23 (emphasis omitted), quoting *In re Waters of Long Valley Creek Stream System,* 25 Cal.3d at 359, 599 P.2d at 669, 158 Cal. Rptr. at 362). Hence, should the Forest Service seek to exercise the unexercised riparian right claimed here, the Board could, upon appropriate findings, subordinate the exercise of that right to rights currently being exercised and could impose such limitations upon the scope, nature and priority of the exercise of that right as might be required to promote reasonable and beneficial use of the water.

ARGUMENT

The California Supreme Court's unanimous decision is correct and does not conflict with any decision of this Court, any federal court of appeals, or any other state court of last resort. To the contrary, it is fully consistent with this Court's recent decisions addressing the federal government's assertion of water rights on federal lands. Accordingly, the petition for a writ of certiorari should be denied.

1. California asserts (Pet. 12-17) that because the Property Clause invests Congress with "complete power" over the federal lands,[8] there is no room for the application of state law doctrines of riparian rights to such lands. This contention is meritless. The Property Clause does not preclude Congress from determining that the federal government shall acquire and hold water rights under state law on the same basis as private landowners. Indeed, Congress has long followed a general policy of deferring to

[8] The Property Clause provides that "[t]he Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States * * * " (U.S. Const. Art. IV, § 3, Cl. 2).

state laws in matters regarding water rights for federal lands. See *California* v. *United States,* 438 U.S. 645, 653, 662 (1978).

For example, this Court observed in *United States* v. *New Mexico,* 438 U.S. 696 (1978), a case involving the federal government's claim to water rights for national forest lands, that "[w]here Congress has expressly addressed the question of whether federal entities must abide by state water law, it has almost invariably deferred to the state law" (*id.* at 702 (footnote omitted)). The Court further explained (*ibid.*):

> Where water is necessary to fulfill the very purposes for which a federal reservation was created, it is reasonable to conclude, even in the face of Congress' express deference to state water law in other areas, that the United States intended to reserve the necessary water. Where water is only valuable for a secondary use of the reservation, however, there arises the contrary inference that Congress intended, consistent with its other views, that the United States would acquire water in the same manner as any other public or private appropriator.

At bottom, California asserts the extraordinary proposition that the Property Clause, by giving Congress "complete power" over federal lands (Pet. 12), prohibits Congress from placing the United States in the same shoes "as any other public or private appropriator" (438 U.S. at 702). That proposition is not only at odds with common sense and Congress's century old practices, it is inconsistent with this Court's decisions. This Court has repeatedly stated that the United States possesses both sovereign powers and the rights of an ordinary proprietor with respect to sovereign lands. *Kleppe* v. *New Mexico,* 426 U.S. 529, 540 (1976); *Alabama* v. *Texas,* 347 U.S. 272, 273

(1954); *Sinclair* v. *United States,* 279 U.S. 263, 297 (1929); *United States* v. *Midwest Oil Co.,* 236 U.S. 459, 474 (1915); *Camfield* v. *United States,* 167 U.S. 518, 524 (1897).

California's alternative constitutional argument, that Congress's power to reserve water on federal lands disqualifies the federal government from asserting "analog[ous]" riparian rights under state law (Pet. 15), is equally without merit. California cites no precedent in support of its proposition that the "reserved rights doctrine * * * is the constitutional analogue of the riparian doctrine" (*ibid.*). The absence of such authority is not surprising. Federal reserved rights and state riparian rights are completely independent concepts established by different sovereigns, created for different purposes, and administered under different standards. There is no reason why Congress's exercise of its plenary power under the Property Clause to reserve sufficient water to meet the primary purposes for which it has set aside public lands should disqualify Congress from allowing the government to rely on state law to meet "secondary" purposes. Indeed, the Court specifically recognized that federal reserved rights coexist with state water rights doctrines in *United States* v. *New Mexico,* when it stated that the federal government would acquire water for secondary purposes "in the same manner as any other public or private appropriator" (438 U.S. at 702).[9]

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[9] Seizing upon the Court's use of the word "appropriator," petitioner asserts (Pet. 16-17) that the *New Mexico* decision indicates that water rights for secondary national forest purposes can be attained only under the prior appropriation doctrine and not pursuant to other state-law water doctrines, such as riparian rights. But as petitioner acknowledges (Pet. 10 n.6), the State of New Mexico does not recognize riparian rights; hence, the Court simply used the terminology appropriate for that case. The California Supreme Court

2. California also contends (Pet. 8-9, 17-21) that the recognition of a state-law riparian right attaching to reserved federal lands would conflict with the policies embodied in the Desert Land Act and other nineteenth century statutes, which, the state claims, " 'severed' all federal property rights in water except as such rights are necessary to serve 'primary' reservation purposes" (*id.* at 17). California bases that position on this Court's decision in *California Oregon Power Co.* v. *Beaver Portland Cement Co., supra.* The Court held there that the Desert Land Act "effected a severance of all waters upon the public domain, not theretofore appropriated, from the land itself" such that "a patent issued thereafter * * * carried with it, of its own force, no common law right to the water flowing through or bordering upon the lands conveyed" (295 U.S. at 158). As a result, the patentee and subsequent grantees "take the legal title to the land conveyed, and such title, and only such title, to the flowing waters thereon as shall be fixed or acknowledged by the customs, laws, and judicial decisions of the state of their location" (*id.* at 162). Thus, each state was left "to determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain" (*id.* at 164).

California's reliance on *California Oregon Power Co.* is misplaced for at least two basic reasons. First, as the California Supreme Court explained (Pet. App. A17-A19), the State of California has chosen to retain the concept of riparian rights and has further determined, as a matter of state law, "that riparian rights exist in federal lands

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was manifestly correct in concluding that the "underlying principle of deference to state law logically extends to *any* water right recognized under local law—including riparian rights" (Pet. App. A11 (emphasis in original)). Deference is appropriate regardless of whether a state follows the prior appropriation doctrine, the riparian doctrine, or, as in California's case, a mixture of the two.

located in California as surely as they inhere in private lands" (*id.* at A18 (citations omitted)). Second, as that court also explained (*id.* at A19-A22), the Desert Land Act applies only to public domain lands. This Court has twice held—in *Cappaert,* 426 U.S. at 143-144, and *Pelton Dam,* 349 U.S. at 448—that the Desert Land Act and its predecessor statutes do not affect reserved lands, such as national forests, which have been withdrawn from the public domain. Since those Acts do not apply to reserved lands, it follows that they do not subordinate the state-law riparian rights attaching to such lands to subsequently perfected water rights (Pet. App. A20-A21).[10]

3. California also asserts (Pet. 22-23) that recognition of a state-law riparian right for wildlife purposes on national forest lands conflicts with the Organic Administration Act of 1897, 16 U.S.C. 473 *et seq.* (1897 Act). California observes that in *United States* v. *New Mexico, supra,* this Court supported its conclusion that no federal

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[10] California contends (Pet. 20-21) that the longstanding statutory construction established in this Court's rulings in *Pelton Dam* and *Cappaert* has been undermined by this Court's subsequent decision in *United States* v. *New Mexico, supra.* California incorrectly characterizes the latter case as creating an inference that the United States must acquire water for secondary reservation purposes solely by appropriation under state law, to the exclusion of state-law riparian rights. As we have explained, however, the only issue before this Court in *New Mexico* was whether the federal reserved rights doctrine was applicable to water required for secondary national forest purposes—no question concerning state-law riparian rights was before the Court in that case nor can anything in *New Mexico* reasonably be construed as casting doubt upon this Court's previous rulings concerning the application of the Desert Land Act and its predecessors to reserved lands. To the contrary, the congressional policy of deference to state water law endorsed by the Court in *New Mexico* militates in favor of such rights.

reserved rights exist for secondary national forest purposes, such as wildlife and recreation, on the basis that one of the purposes of the 1897 Act (which governed the establishment of the forest reserves) was to enhance the quantity of water that would be available to the settlers in the arid West. A federal reserved water right, the Court found, would tend to defeat that purpose (438 U.S. at 711, 713). California now asserts that a state-law riparian right for wildlife purposes would similarly defeat the objective of making water available to settlers.

The California Supreme Court correctly rejected that contention (Pet. App. A22). Indeed, the argument obviously proves too much. As this Court explained, the federal government is entitled to obtain water for secondary national forest purposes, such as wildlife consumption, provided that it does so pursuant to state law (*New Mexico,* 438 U.S. at 702).[11] The federal government is no less entitled to obtain that water if it chooses to invoke its state-recognized riparian rights rather than appropriative rights. While the exercise of those riparian rights on national forest lands may tend to decrease the total amount of water available to persons for other purposes, it is equally true that a similar diminishment would occur if the federal government obtained the water for that same purpose

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[11] By enactment of the Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. 528 *et seq.*, Congress directed that the purpose of the national forests shall include, among other things, preservation of wildlife. See *New Mexico,* 438 U.S. at 713-715. In addition, Congress has authorized the Forest Service to expend federal funds for the "investigation and establishment of water rights * * * necessary or beneficial in connection with the administration and public use of the national forests" (16 U.S.C. 526). Thus, there is no doubt that the Forest Service may assert water rights pursuant to state law for wildlife purposes. See *United States* v. *City & County of Denver,* 656 P.2d 1, 21-22 (Colo. 1982).

under the appropriative rights doctrine. California can hardly complain if its own laws give the federal government, along with other riparian landowners, the option of invoking riparian rights.

4. The California Supreme Court also correctly rejected (Pet. App. A22-A25) California's assertions that the recognition of a riparian right attaching to national forest lands would substantially disrupt existing patterns of water use in California. Under Article X, Section 2 of the California Constitution, water rights, including riparian water rights, are subject to the requirement of reasonable and beneficial use.[12] The riparian right at issue here, as a right claimed under state law, is subject to this requirement. Moreover, as pointed out by the California Supreme Court (Pet. App. A23-A25), the California Water Resources Control Board is entitled under California law to determine that an unexercised riparian right (such as the one claimed here) shall be subordinated to appropriative and riparian rights currently being exercised and, in addition, the Board may make such determinations as to the scope, nature and priority of the unexercised riparian right as the Board deems to be reasonably necessary to the promotion of the state's interests in foster-

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[12] Article X, Section 2 of the Constitution of the State of California provides in pertinent part:

> The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses.

ing the most reasonable and beneficial use of its water resources.

Finally, California asserts (Pet. 26) that recognition of a riparian right in favor of the United States would impair the administration of the State's appropriation process, which petitioner asserts is "the principal means by which the State plans and manages the allocation of its water supply." The same assertion, however, can be made with regard to riparian rights claimed by nonfederal entities. Unlike the many other western states that recognize only appropriative water rights, California recognizes both appropriative and riparian water rights. This being so, there is no credible reason why the United States should be uniquely disqualified from asserting riparian rights in that state. As the court of appeal stated (Pet. App. A38), there is "no justification for holding that riparian water rights inhere in some lands, but not in others, based solely upon the identity of the owner of the land."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General
ROGER J. MARZULLA
Assistant Attorney General
EDWARD J. SHAWAKER
ROBERT L. KLARQUIST
Attorneys

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Supreme Court of the United States

October Term, 1988

State of California, *et al.*,

Petitioners,

vs.

The United States of America, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the California Supreme Court

BRIEF IN OPPOSITION OF RESPONDENT-INTERVENOR SIERRA CLUB

LAURENS H. SILVER
SIERRA CLUB LEGAL DEFENSE FUND
2044 Fillmore Street
San Francisco, CA 94115
(415) 567-6100

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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I. STATEMENT OF THE CASE

At issue in this case is whether the United States, like all other proprietors of riparian land in California, enjoys under state law riparian water rights that it may use to effectuate congressionally mandated management objectives for its forest reservation lands in California. Unanimously, the California Supreme Court, relying upon its historic decision in *Lux v. Haggin*, 69 Cal. 255 (1886), has held that the United States enjoys riparian rights under California law with respect to its lands reserved for national forest purposes. *State Water Resources Control Board, et al. v. United States*, 44 Cal.3d 448, 243 Cal. Rptr. 887 (1988).

Petitioners ask this court to rule that since the United States acts only in a sovereign capacity with respect to its lands, and not in a proprietary capacity, it cannot enjoy the same riparian water rights that California law grants to other proprietors of riparian lands. In so framing the question, petitioners ignore the long-established principle that the United States can and does act in a proprietary capacity with respect to its lands, and that its proprietary rights may be established by reference to state law.

Additionally, petitioners ask this Court to hold that under *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935), the United States has divested itself of all "proprietary" interests in water in connection with its reserved lands and has dedicated those waters completely to the states for allocation and use by private parties in accord with state law. If, as petitioners claim, the United States has divested itself of all water rights associated with its reserved and withdrawn lands, it cannot claim riparian water rights arising under state law for secondary reservation purposes.

Petitioners predicate this second claim on a reading of *California Oregon Power* that has never been countenanced or adopted by this Court. In *California Oregon Power*, this Court fashioned a nationally uniform rule of federal conveyancing to determine if any federal rights in water passed to grantees of federal lands. When it stated in *California Oregon Power* that the Desert Land Act of 1877, 43 U.S.C. § 321 *et seq.*, had severed federal water rights from federal lands, this Court meant only that when federal lands were granted to private individuals for agricultural and homesteading purposes, no federal water rights were transferred. Since the Desert Land Act of 1877 did not apply to lands that are withdrawn or reserved, *Federal Power Commission v. Oregon*, 349 U.S. 435, 443-444 (1955), *Cappaert v. United States*, 426 U.S. 128 (1976), this Court, in *California Oregon Power*, had no occasion to decide what water rights remained attached to federal lands that were withdrawn or reserved from operation of the public land laws and therefore could not be granted to private individuals. In *United States v. New Mexico*, 438 U.S. 696 (1978), this Court held that the United States is entitled to use water obtained under state law on its reserved lands for "secondary reservation purposes."

Over the last century, numerous forest reservations, national parks, wildlife refuges, and wilderness areas have been designated by statute or by executive action pursuant to statutory authorization. All of these lands are intended to be retained in public ownership for a variety of public uses and cannot be transferred or conveyed

under public land disposal statutes.[1] The question thus posed by this case is whether the United States can enjoy water rights arising under state law with respect to its reserved lands in order to manage such lands for secondary management objectives prescribed by Congress in the varied laws designating such areas and reserving them for special uses. The California Supreme Court was correct when it unanimously concluded that consistent with a Congressionally prescribed secondary management objective, the provision of water for wildlife, for which federal reserved rights are not available, *see United States v. New Mexico*, 438 U.S. at 702-704, the United States

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[1] The public domain includes lands that are open to settlement, public sale or other disposition under the federal public land laws, and not exclusively dedicated to any specific governmental or public purpose. *See Federal Power Commission v. Oregon*, 349 U.S. 435, 443-44 (1955) (*Pelton Dam*); *United States v. Minnesota*, 270 U.S. 181, 206 (1926). Public domain lands are for the most part managed by the Department of the Interior, through its Bureau of Land Management (BLM). Reserved lands are lands that have been expressly withdrawn from the public domain by statute, executive order, or treaty, and dedicated to a specific federal purpose. As a general rule, land that has been withdrawn from the public domain is no longer subject to laws governing the disposition or sale of public lands. *See Federal Power Commission v. Oregon, supra*, 349 U.S. at 443-444.

Until the last quarter of the 19th century the emphasis of Congress was on the disposal of the public lands. Some of the land originally owned by the federal government has accordingly been patented under the terms of the federal public land laws. The term "public land laws" is generally used to refer to statutes providing for the sale or disposition of public lands, such as the Homestead Act, May 20, 1862, 12 Stat. 392,

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enjoys the same water rights under California law as any other owner of riparian real property.[2]

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43 U.S.C. § 161 (1970) (*repealed* 1976), and the Desert Land Act of 1877, March 3, 1877, 19 Stat. 377, 43 U.S.C. § 321 *et seq.* A major shift in public land policy, from disposal to conservation, began in 1872 when the lands that eventually became Yellowstone National Park were withdrawn from entry and settlement. Act of March 1, 1872, codified at 16 U.S.C. § 21. *See, e.g.*, National Park Service Act of August 25, 1916, 39 Stat. 535, *as amended*, 16 U.S.C. § 1 *et seq.* This conservation ethic was evidenced further in 1891 when Congress enacted a statute authorizing the President to create forest reserves. Act of March 3, 1891, ch. 561, § 24, 26 Stat. 1095 (repealed 1976). Eventually the conservation ethic resulted in the reservation and withdrawal of lands for national forests, national parks, wildlife refuges, wilderness areas, and national recreation areas.

The Taylor Grazing Act of 1934, 43 U.S.C. § 315 *et seq.*, set aside eighty million acres as grazing preserves. This Act, along with two executive orders withdrawing the remaining public land from homestead entry, resulted in a *de facto* closing of the public domain (excluding certain portions of Alaska) to homesteading and entry under other public land laws as of 1935.

[2] California has a dual system which recognizes both appropriative and riparian water rights. The riparian doctrine confers upon the owner of land contiguous to a watercourse the right to the reasonable and beneficial use of water on his land. *National Audubon Society v. Superior Court of Alpine Co.*, 33 Cal.3d 419 (1983). Since the adoption of the constitutional amendment of 1928, the riparian owner is limited to a reasonable beneficial use of the water under reasonable conditions of diversion and use. Cal. Const. Art. XIV, § 3 (1928) (current version at Cal. Const. Art. X, § 2). *See Fullerton v. State Water Resources Control Bd.*, 90 Cal. App.3d 590, 596 (1979). For a

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Congress has never divested the federal reserved lands of water rights accruing to them under state law. To the contrary, Congress has manifested its willingness and desire that federal land management agencies enforce and claim water rights under state law to accomplish the secondary purposes for which it has reserved federal lands. The unanimous decision of the California Supreme Court was correct and need not be reviewed by this Court. This Court should therefore deny the Petition for Certiorari.

II. SUMMARY OF OPINION BELOW

The California Supreme Court unanimously held that the United States has enforceable riparian rights with respect to lands reserved for forest purposes in California. In so holding, the California Supreme Court followed "the long-established principle that Congress not only may, but nearly always has, deferred to state law in determining rights to water on federal lands." 243 Cal. Rptr. at 893. According to the Court, this "principle of deference" extends to riparian rights recognized under California law. *Id.* Longstanding principles of California law relating to riparian water rights require application of that doctrine to lands of the United States. *Id.* at 898. The Court held that since the United States holds its

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general history of the development of the riparian doctrine in California, *see U.S. v. Gerlach Live Stock Co.*, 339 U.S. 725, 742-755 (1950) and D. Anderson, *Riparian Water Rights in California* 1-22, 49-61 (Governor's Commission to Review California Water Rights Law, Staff Paper No. 4, 1977). *See also* W. Hutchins, *The California Law of Water Rights* 178 *et seq.* (1956).

lands in both a proprietary and sovereign capacity, it was not barred by any principle of federal law from enjoying proprietary water rights under state law. *Id.* at 892-893.

The California Supreme Court rejected the State's contention that Congress affirmatively relinquished all proprietary claims to the waters of the West through the enactment of the Desert Land Act of 1877, *supra*. The Court held that the United States had not relinquished such proprietary claims to water on its reserved lands, since Congress had never expressed any intent to relinquish such claims on lands reserved from the public domain. The Court stated: "Indeed, had that been Congress' intent, it is reasonable to assume that that is precisely what Congress would have said, and what the United States Supreme Court would have held . . ." 243 Cal. Rptr. at 897.

The Court also held that the riparian rights of the United States could have priority as against subsequent claimants. The Court could find no expression of Congressional intent to subject water rights held by the United States for secondary reservation purposes "to defeasance by subsequent claimants." 243 Cal. Rptr. at 900. Quoting from *Clark v. Uebersee Finanz-Korp*, 332 U.S. 480, 489 (1947), the Court stated: "We will not 'impute to Congress a purpose to paralyze with one hand what it sought to promote with the other.'" Finally, the Court rejected the contentions of the petitioners that recognition of unexercised riparian rights in federal reserved lands would disrupt the settled rights of appropriators throughout the state and impair the Board's ability to plan and manage the allocation of the state's scarce water supply. 243 Cal. Rptr. at 900-901.

III. ALTHOUGH IN THREE NINETEENTH CENTURY PUBLIC LAND DISPOSAL LAWS CONGRESS INDICATED ITS INTENT TO ALLOW THE ACQUISITION OF WATER RIGHTS ON PUBLIC DOMAIN LANDS TO BE GOVERNED BY STATE LAW, CONGRESS DID NOT INTEND TO FORFEIT WATER RIGHTS ARISING UNDER STATE LAW WITH RESPECT TO RESERVED LANDS.

In three Acts enacted in the second half of the nineteenth century[3] Congress expressed its intent to defer to state law with regard to the acquisition of water rights on the public lands; but it expressed no intent to relinquish federal water rights on reserved lands not subject to disposition or entry under the public land laws. In the Mining Act of 1866 Congress included a provision that recognized as valid rights to the use of water on the public lands arising under state law:

> Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same. . . .

43 U.S.C. § 661.

Four years later, Congress amended the Mining Act of 1866 to extend its applicability to "placer" mines. Act of July 9, 1870, 16 Stat. 218, codified at 30 U.S.C. §§ 51, 52, and 43 U.S.C. § 661. The Act provided:

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[3] Act of July 26, 1866, 14 Stat. 253, codified at 30 U.S.C. §§ 51, 52 and 43 U.S.C. § 661; Act of July 9, 1870, 16 Stat. 218, codified at 30 U.S.C. §§ 51, 52 and 43 U.S.C. § 661; and the Desert Land Act of 1877, 19 Stat. 377, ch. 107, 43 U.S.C. § 321 *et seq.*

> All patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by [the Mining Act of 1866].

43 U.S.C. § 661.

In 1877 Congress passed the Desert Land Act, *supra*, which permitted persons in thirteen western states to enter and receive patent to irrigable federal lands "by conducting water upon the same . . . [by] bona fide prior appropriation." In *California Oregon Power*, *supra*, this Court held that land patents granted by the federal government to settlers under the Desert Land Act did not convey any riparian water rights, because Congress, in the Desert Land Act, had declared its intention to patent title in land only and not interests in water. 295 U.S. at 158. In construing the Act as effecting "a severance of all waters upon the *public domain*, not theretofore appropriated, from the land itself," 295 U.S. at 158, 162 (emphasis added),[4] this Court stated:

> The fair construction of the [Desert Land Act of 1877] is that Congress intended to establish the rule that for the future the land should be patented separately; and that all non-navigable waters thereon should be reserved for the use of the public under the laws of the states and territories named . . . The terms of the

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[4] It is significant that Justice Sutherland described the separation of water rights from the conveyance of federal property as "severance." The need to "sever" such rights implies that federal water were pre-existing and attached to the land. In California, these preexisting federal water rights included riparian water rights arising under state law. With respect to reserved lands not subject to the Desert Land Act, these preexisting federal rights would not be severed.

> statute, thus construed, must be read into every patent thereafter issued, with the same force as though expressly incorporated therein, with the result that the grantee will take legal title to the land conveyed, and such title and only such title to the flowing waters thereon as shall be fixed or acknowledged by the customs, laws, and judicial decisions of the state of their location. *If it be conceded that in the absence of federal legislation the state would be powerless to affect the riparian rights of the United States or its grantees, still, the authority of Congress to vest such power in the state, and that it has done so by the legislation to which we have referred, cannot be doubted.*
>
> What we hold is that following the act of 1877, if not before, all non-navigable waters then a part of the *public domain* became *publici juris,* subject to the plenary control of the designated states, including those since created out of the territories named, *with the right in each to determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain . . . [T]he Desert Land Act does not bind or purport to bind the states to any policy.* It simply recognizes and gives sanction, in so far as the United States and its future grantees are concerned, to the state and local doctrine of appropriation, and seeks to remove what otherwise might be an impediment to its full and successful operation.

Id. at 162-164 (emphases added).[5]

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[5] In *California v. United States,* 438 U.S. 645, 663 (1978) (quoting *Kansas v. Colorado,* 206 U.S. 46, 94 (1907)), this Court reaffirmed the principle "that each State may determine for itself whether the common law rule in respect to riparian rights or that doctrine which obtains in the arid regions of the West of the appropriation of waters for the purposes of irrigation shall control. Congress cannot enforce either rule upon any State." Thus Congress has never federalized the doctrine of appropriation and has acquiesced in state recognition of riparian water rights.

In *Federal Power Commission v. Oregon (Pelton Dam)*, 349 U.S. 435 (1955), this Court held that the 1866, 1870, and 1877 Acts did not apply to federal "reserved" or "withdrawn" lands, but only to "public lands" of the United States. In so ruling, this Court stated:

> The purpose of the Acts of 1866 and 1870 was governmental recognition and sanction of possessory rights *on public lands* asserted under local laws and customs. *Jennison v. Kirk*, 98 U.S. 453, 25 L.Ed. 240. The Desert Land Act severed, *for purposes of private acquisition*, soil and water rights on *public lands*, and provided that such water rights were to be acquired in the manner provided by the law of the State of Location . . .
>
> It is not necessary for us, in the instant case, to pass upon the question whether this legislation constitutes the express delegation or conveyance of power that is claimed by the State [that all waters on federal land were under the exclusive sovereign control of the states by reason of the Desert Land Act of 1877], because these Acts are not applicable to the reserved lands and waters here involved. The Desert Land Act covers "sources of water supply upon the public lands. . . ." The lands before us in this case are not "public lands" but "reservations." Even without that express restriction of the Desert Land Act to sources of water supply on public lands, these Acts would not apply to reserved lands. "It is a familiar principle of public land law that statutes providing generally for disposal of the public domain are inapplicable to lands which are not unqualifiedly subject to sale and disposition because they have been appropriated to some other purpose." *United States v. O'Donnell*, 303 U.S. 501, 510, 58 S.Ct. 708, 714, 82 L.Ed. 980. (emphasis added)

349 U.S. at 447-448. In *Cappaert v. United States*, 426 U.S. 128, 144-5 (1976), this Court reiterated its earlier holding

in *Pelton Dam* that the Desert Land Act does not apply to reserved lands.[6]

This Court has discouraged broad interpretations of severance arising from *California Oregon Power*. In *Pelton Dam*, the Court characterized the Desert Land Act as "sever[ing], *for purposes of private acquisition*, soil and water rights *on public lands*." *Federal Power Commission v. Oregon, supra*, 349 U.S. at 448 (first emphasis added; second emphasis in original). In *Cappaert v. United States*,

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[6] Petitioners claim, Petition at 21, that in *United States v. New Mexico, supra*, this Court overruled, "*sub silentio*, its earlier analyses in *Pelton Dam* and *Cappaert* that the *Desert Land Act* does not apply on reserved lands." Petitioners are mistaken; *Pelton Dam* and *Cappaert* remain good law. In *United States v. New Mexico*, this Court held that the United States may claim water rights under state law to accomplish secondary purposes of federal reservations. Petitioners seriously mischaracterize this Court's ruling when they state that this Court held that "the Desert Land Act and Mining Act, among others, makes [sic] state appropriation laws applicable on reserved lands – to the extent that secondary purposes are involved." Petition at 21. In fact, this Court did not even mention those Acts as the theoretical underpinning of its ruling in *United States v. New Mexico*. Instead, this Court relied on several statutes authorizing establishment of water rights on reserved lands in accordance with state law. 438 U.S. at 702-703. This Court also discussed the Forest Service Organic Act of 1897, which provided that "all waters within the boundaries of national forests may be used for domestic, mining, milling, or irrigation purposes, under the laws of the State wherein such national forests are situated, or under the laws of the United States. . . ." 30 Stat. 36, as amended, 16 U.S.C. § 481. The Organic Act of 1897 in no manner "severes", waives, or forfeits federal water rights arising under state law. Although the waters of national forests remain subject to appropriation, such appropriative uses would be junior to exercised federal water rights arising under state law.

supra, this Court characterized the Desert Land Act as "provid[ing] that patentees of public land acquire only title to land through the patent and must acquire water rights in non-navigable water in accordance with state law." 426 U.S. at 143.

At the time the Mining Acts and Desert Land Act of 1877 were passed, Congress was principally concerned not with possible federal-state conflicts over the use of water on the retained public lands, but rather with settlement of disputes between private claimants. The primary purpose of provisions of the acts dealing with water rights was to clarify that private patentees or users of federal lands for mining or grazing purposes would not acquire, by virtue of that patent or use, any rights to unappropriated water except as recognized by state law.

At the time the Desert Land Act was enacted in 1877, Congress had already authorized the creation of reservations and the making of withdrawals. Pursuant to such authorizations, a significant portion of the federal lands had already been withdrawn and/or reserved. From the first establishment of the federal government, Congress delegated authority to the Executive to make withdrawals and reservations of public domain lands. Wheatley, *Study of Withdrawals and Reservations of Public Domain Lands*, Public Land Law Review Commission, p. 55. Legislation relating to the disposition of land in the Territory of Michigan is representative of the delegation of general withdrawal authority for "public purposes" to the President. *Id.* at 56.[7] The President was also granted

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[7] The Act of March 3, 1807, ch. 34, § 2, 2 Stat. 437, 438, provided that confirmation of any claim to lands granted "shall not entend to any tract heretofore reserved, or which may be by the President of the United States set aside for public uses." *See* also the Act of March 1, 1847, ch. 32, § 2, 9 Stat. 146.

the authority to create military reservations. Act of June 13, 1812, ch. 99, § 2, 2 Stat. 748, 750; Act of March 1, 1817, ch. 22, 3 Stat. 347, *repealed by* 47 Stat. 1349; Act of September 27, 1850, ch. 76, § 14, 9 Stat. 496, 500. Additionally, the President was granted the authority to create Indian reservations. *See* Act of May 28, 1830, ch. 148, § 1, 4 Stat. 411, 412; Act of April 8, 1864, ch. 48, § 2, 13 Stat. 39, 40.[8]

The first national park reservation was created by Congress in 1872 when Yellowstone National Park was established. Act of March 1, 1872, ch. 24, § 1, codified at 16 U.S.C. § 21. The lands within the designated boundaries were "reserved and withdrawn from settlement, occupancy, or sale under the laws of the United States, and dedicated and set apart as a public park or pleasuring ground for the benefit and enjoyment of the people." *Id.*

When Congress limited the applicability of the Desert Land Act to the "public lands," the distinction between "public lands" and "withdrawn" or "reserved" lands was well recognized. When Congress provided that "all surplus water over and above such appropriation and use, together with the water of all [sic], lakes, rivers and other sources of water supply upon the *public lands* and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes. . .," it was expressing its

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[8] Grants to states or directly to railroad companies for the construction of railroads within the granted areas often contained provisions for the withdrawal of lands in aid thereof. Wheatley, *id.*, p. 61. *See, e.g.*, Act of July 1, 1862, ch. 120, 12 Stat. 489, 492, 493.

intent to retain interests in the non-navigable waters on then reserved or withdrawn lands, or on lands reserved or withdrawn in the future.[9] This is why it limited the applicability of the Desert Land Act of 1877 to the *public lands*.

In *California Oregon Power*, this Court acknowledged the intent of Congress in the Desert Land Act to acquiesce in state adoption of rules of appropriation and/or the common law rules of riparian rights to determine private rights to use waters on lands patented by the United States. Therefore, in a state like California that has adopted a riparian water rights system, patentees of public domain lands enjoy riparian rights with priority as of the date of patent. As the California Supreme Court ruled in this case, California also recognizes riparian rights in lands retained by the United States. Since, under *California Oregon Power* "severance" or separation of the water rights from the lands takes place only when the lands are patented, "severance" never takes place with respect to reserved lands since such lands are to be retained by the United States. Therefore riparian rights arising under

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[9] If, as petitioners claim, Congress' intent in the Desert Land Act was to maximize the amount of water available to settlers of arid lands, then Congress would have made the Desert Land Act applicable to reserved as well as public domain lands. Moreover, it would have "federalized" the doctrine of appropriation by precluding the states from administering "dual systems" of water law that validated riparian rights and made it more difficult for appropriators to divert water. Contrary to petitioners' contention, Petition at 19, Congress has not, in aid of settlement of the arid lands of the West, manifested any intent to preclude the United States from claiming water rights arising under state law in connection with its reserved lands.

state law remain attached to reserved lands, subject to appropriations that were effectuated under local law prior to the date of the reservation. The United States enjoys priority, at the earliest, when public domain lands are reserved and therefore no longer subject to entry under the Desert Land Act, or other public land laws. *State Water Resources Control Board et al. v. United States, supra,* 243 Cal. Rptr. at 900-901.

Federal law is, under *United States v. New Mexico, supra,* the source of reserved water rights solely to accomplish primary reservation purposes. State law is the source of water rights to accomplish secondary management objectives prescribed by Congress for federal forest reservations.[10] The United States may employ its riparian rights conferred under state law for reasonable and beneficial uses, *see State Water Control Board et al. v. United States, supra,* 243 Cal. Rptr. at 889, n. 2, related to management of the national forests for secondary purposes. *See* IV, *infra.*

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[10] Secondary purposes of federal reservations include management for wildlife. The Forest Service is required to manage its lands for wildlife protection. 16 U.S.C. § 528 provides that "[i]t is the policy of Congress that the national forests are established and shall be administered for outdoor recreation range, timber, watershed, and wildlife and fish purposes." *See* 36 C.F.R. Part 241 (Wildlife) and 16 U.S.C. §§ 1604(e),(g). The Forest Service is obligated to prepare land use plans which take into account management of the forests for wildlife protection. 16 U.S.C. § 1604(g)(3)(A). The Forest Service is obligated to follow its land use plans, once they are promulgated, in its management of the national forests. 16 U.S.C. § 1604(i). Under 36 C.F.R. § 219.19, the Forest Service must manage fish and wildlife habitat to maintain viable populations of existing native species of vertebrates. *See also* 16 U.S.C. § 1604(g)(3)(B).

IV. THERE IS NO BASIS FOR PETITIONERS' ASSERTION THAT FEDERAL RESERVED WATER RIGHTS ARE THE EXCLUSIVE FEDERAL INTERESTS IN WATER THAT CAN EXIST WITH RESPECT TO RESERVED OR WITHDRAWN LANDS.

Petitioners make the argument that federal reserved rights are the exclusive interests in water that can be claimed by the United States pursuant to its Property Clause powers. Petition at 15. In *United States v. New Mexico, supra,* this Court rejected the notion that federal reserved rights were the exclusive federal water interests that could exist with respect to reserved lands. This Court held that federal reserved rights exist only to satisfy the primary purposes of reservations and that for secondary purposes of reservations water must be obtained under state law. 438 U.S. 702-703. Recognizing that Congress has authorized the Park Service to acquire water rights arising under state law to be used on federal reservations, 438 U.S. at 702, this Court cited the National Park Service Act of August 7, 1946, 16 U.S.C. § 17j-2, which provides appropriations for the

> establishment of water rights *in accordance with local custom, laws, and decisions of courts,* including the acquisition of water rights or of lands or interests in lands or rights-of-way for use and protection of water rights necessary or beneficial in the administration and public use of the national parks and monuments.

438 U.S. at 702-703 (emphasis in original). After noting that "the agencies responsible for administering the federal reservations have also recognized Congress' intent to acquire under state law any water not essential to the specific purposes of the reservation," 438 U.S. at 703, this Court cited 16 U.S.C. § 526, which authorizes the appropriation of funds "for the investigation and establishment of water rights . . . necessary or beneficial in connection

administration and public use of the national forests." 438 U.S. at 703, n. 6.

Petitioners base their entire argument on this Court's statement in *New Mexico* that:

> Where water is only valuable for a secondary use of the reservation, however, there arises the contrary inference that Congress intended, consistent with its other views, that the United States would acquire water in the same manner as any other public or private *appropriator*.

438 U.S. at 702 (emphasis added). Read together with the next paragraph,[11] it is clear that this Court did not intend to limit the United States to appropriative rights in a state that has a dual system of water law, as does California. Rather, the selected Acts of Congress quoted by this Court, 438 U.S. at 703, make it clear that Congress has

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[11] That paragraph states:

> Congress indeed has appropriated funds for the acquisition under state law of water to be used on federal reservations. Thus, in the National Park Service Act of Aug. 7, 1946, 60 Stat. 885, as amended, 16 U.S.C. § 17j-2 (1976 ed.), Congress authorized appropriations for the "[i]nvestigation and establishment of water rights *in accordance with local custom, laws, and decisions of courts*, including the acquisition of water rights or of lands or interests in lands or rights-of-way for use and protection of water rights necessary or beneficial in the administration and public use of the national parks and monuments." (Emphasis added.) The agencies responsible for administering the federal reservations have also recognized Congress' intent to acquire under state law any water not essential to the specific purposes of the reservation.

438 U.S. at 702-703 (footnotes omitted, emphasis in original).

chosen to claim as federal property whatever water rights are recognized under local customs and laws when necessary to manage its reserved lands in accord with the secondary purposes of the reservation.

Although in the Desert Land Act of 1877 Congress severed federal interests in water from its interests in lands for the purposes of conveyance by patent of the federal lands to private individuals under the various public land disposal statutes, Congress has authorized federal land management agencies to claim state created riparian water rights in order to satisfy secondary management objectives of reserved or withdrawn federal lands. When all of its actions are considered together, it is clear that Congress has chosen to retain its interests in water arising under state law with respect to its reserved lands.[12] Congress has not demonstrated any intent not to enjoy the same proprietary water rights under state law with respect to its reserved lands as exist in privately owned riparian lands.

V. THE UNITED STATES CAN ENJOY PROPRIETARY WATER RIGHTS UNDER STATE LAW WITH RESPECT TO ITS LANDS.

At page 7 of their Petition for Writ of Certiorari, petitioners state "[t]he question whether the United

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[12] In *United States v. District Court, County of Eagle, Colorado*, 401 U.S. 520, 524 (1971), this Court stated that 43 U.S.C. § 666(a), which confers Congressional consent for the joinder of the United States in state procedures for the adjudication of water rights, applies to appropriative rights, reserved rights, and "riparian" rights "owned" by the United States. Although this statement was *dictum*, it constituted an acknowledgment by this Court of the United States' ownership of riparian rights that could be subject to state adjudication procedures.

States has riparian rights ultimately turns on whether the United States' property interests – of whatever nature – arise solely under the Property Clause, or instead whether the United States has the same property rights as ordinary landowners." The question need not be framed disjunctively, for there is no *a priori* reason why the United States, pursuant to its Property Clause Powers, cannot enjoy the same water rights arising under state law as private proprietors do. Given the power of Congress under the Property Clause to cede its constitutional authority over unappropriated water on the federal lands to the states, acknowledged in *California Oregon Power, supra,* Congress must clearly also have the power not to cede or waive federal property interests in water on the federal lands that are derived from state law. Congress expressed an intent not to cede its interests in water on reserved lands when it limited the applicability of the Desert Land Act to "public lands."

The scope of federal property interests are often governed by state law. *See Clearfield Trust Co. v. United States,* 318 U.S. 363, 367 (1943); *U.S. v. Little Lake Misere Land Co.,* 412 U.S. 580, 592-595 (1973) (acknowledging that established body of state property law may govern federal land acquisitions). *See also North Dakota v. United States,* 460 U.S. 300, 103 S.Ct. 1095, 1105 (1983). *See also* Petition at 8, n. 4 ("Conceivably, however, state property laws could be 'borrowed' to develop a uniform [sic] national rule, assuming that federal law contains an interstice and that such borrowing is supported by federal policy."). State rules of avulsion have been applied to adjust boundaries of Indian reservations. *See Wilson v. Omaha Indian Tribe,* 442 U.S. 653 (1979).

When it fails to establish a uniform federal rule, Congress has sanctioned the application of state law to determine federal title as well as numerous other legal consequences of the ownership and use of federal property. *Wilson v. Omaha Indian Tribe, supra.* This incorporation of state law arises by implication from Acts of Congress enacted under its Property Clause powers.[13]

Petitioners' claim that the United States cannot enjoy proprietary interests which arise under state law with respect to its national forest lands is belied by *United States v. Boone,* 476 F.2d 276 (10th Cir. 1973). There the Court held that the federal government could bring suit under a state fire suppression costs recovery statute. In *United States v. State of California,* 655 F.2d 914 (9th Cir. 1980), after characterizing *Boone, supra,* as a "decision based in part" upon the local nature of federal suits instituted to protect the proprietary interests of the United States, 655 F.2d at 919, the Court held that California law creating a cause of action for recoupment of costs for fire suppression governed a claim of the United States for reimbursement of the costs of national forest fire suppression.

Petitioners argue that the United States, as owner of the reserved national forest lands, can have no riparian rights under state law, since all of its functions with respect to such lands are sovereign, and not proprietary.

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[13] For example, the federal government is authorized to acquire property for governmental offices and to rent excess office space. *See* 40 U.S.C. 490(a)(12-14). Acquisition of such property and leasing of such property may be governed by state law.

Petition at 12-15. According to petitioners, since it holds the public lands as a sovereign, the United States cannot enjoy "proprietary" water rights under state law. This argument widely misses the mark. In addition to ignoring *United States v. New Mexico, supra,* in which this Court recognized the prerogative of the United States to obtain water rights under state law in accordance with local custom and laws, *see* IV, *supra,* petitioners ignore *Camfield v. United States,* 167 U.S. 518, 524 (1897), in which this Court held that "the government has, with respect to its own lands, the rights of an ordinary proprietor, to maintain its possession and to prosecute trespassers. It may deal with such lands precisely as a private individual may deal with his farming property." Likewise, in *Kleppe v. New Mexico,* 426 U.S. at 529, 540 (1976), this Court explicitly recognized that Congress, in exercise of its Property Clause powers, is both a proprietor and a sovereign with respect to the federal lands. That the United States as sovereign also claims federal reserved rights that cannot be held by a private party is neither relevant nor inequitable, for as *Kleppe* and *Camfield, supra,* declare, the United States, in the exercise of its Property Clause powers, holds its lands in *both* a proprietary and sovereign capacity. Under *United States v. New Mexico,* the water rights of the United States claimed by it as a proprietor for secondary purposes of a forest reservation are governed by state law.

Nor, as suggested by petitioners, *see* Petition at 8, is there anything abnormal or aberrant in having federal water rights vary according to whether a state has adopted a dual system of water rights or solely the appropriation doctrine. As Professor Trelease has stated:

> At least for the Forest Service these differences are to be resolved according to the different state laws. The Supreme Court said in *United States v. New Mexico* that, in establishing the national forests, Congress intended that for certain purposes the Forest Service should have reserved rights, but for other purposes it must look to state law. *Congress' intention was to allow instream flows in the forests to the extent that state law allows them* . . . .
>
> In *California v. United States,* [438 U.S. 645 (1978)] the Court emphasizes the physical and climatic differences between the western states as justifications for section 8 of the Reclamation Act, which mandates that state law shall govern reclamation projects for the production of food and fiber. Why should not the same be true of instream flows? Considering that Mr. Justice Rehnquist handed down *California v. United States,* and *United States v. New Mexico* on the same day, and that in *New Mexico* he cited *California,* it seems reasonable to believe that his justification for state-to-state variation of federal reclamation projects carried over to justify his quite specific ruling that national forests' claims to instream flows should be governed by state law.

Trelease, Uneasy Federalism – *State Water Laws and National Water Uses,* 55 Washington Law Review 751, 774 (November 1980) (emphasis added).[14]

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[14] As another commentator has noted:

> For example, uniformity is not essential to the National Forest management program. It could, in fact, be damaging to the program. "One of the basic concepts of multiple use is that all of these resources are entitled to equal consideration, but in particularized or localized areas, relative values of the various resources are to be recognized." The Secretary of Agriculture must give "due consideration to the relative values of various resources in particular

(Continued on following page)

VI. THE ORGANIC ADMINISTRATION ACT OF 1897 IN NO MANNER PRECLUDES THE UNITED STATES FROM ASSERTING RIPARIAN RIGHTS FOR WILDLIFE PURPOSES ON NATIONAL FOREST LANDS.

The exercise of riparian rights under state law to accomplish forest management purposes constitutes a use of national forest waters for reasonable and beneficial uses under the laws of the United States and the State of California. Waters used by the United States under state law for secondary reservation purposes become unavailable for "domestic, mining, milling, or irrigation purposes" within the meaning of 16 U.S.C. § 481. Thus, the exercise by the Forest Service of its delegated powers to

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(Continued from previous page)

areas." He also must "provide for public participation in the development, review, and revision of land management plans." His approach to land management must be "systematic" and "interdisciplinary," but nowhere is he charged with the duty of achieving uniformity of forest management. This is not surprising; the policy behind the multiple uses that the Secretary must achieve demands that periodic adjustments in use be made "to conform to changing needs and conditions" and that "some land will be used for less than all of the resources." Uniformity simply is not important to the program.

Thus, neither public lands administered by the Bureau of Land Management nor National Forest System lands require uniform management. Because Congress either has adapted its programs to state law or has designed them to allow for variations in management according to local conditions, lack of uniformity will not frustrate any specific federal objectives.

Note, *Federal Nonreserved Water Rights*, 48 U. of Chicago L.R. 758, at 778 (1981).

manage the national forests renders the waters used no longer excess and subject to subsequent appropriation.

In *United States v. New Mexico, supra,* this Court held that federal reserved water rights exist only with respect to primary purposes of reservations, and that the Forest Service must obtain water under state law to manage national forests for secondary purposes.[15] This Court explicitly noted that since Congress has authorized the expenditure of federal funds for the establishment of water rights under state law for use on federal reservations, citing 16 U.S.C. § 17j-2(g), and 16 U.S.C. § 526, Congress has indicated its intent that water rights to advance secondary purposes of federal reservations be obtained under state law. 438 U.S. at 702-703. Thus, in *United States v. New Mexico, supra,* this Court concluded that Congress intended the Forest Service to use water rights recognized under state laws and customs to accomplish congressionally prescribed secondary management objectives of federal reservations.

When Congress had earlier provided in the Organic Administration Act of 1897, 30 Stat. 34, 16 U.S.C. § 473 *et seq.*, that "all waters within the boundaries of national forests may be used for domestic, mining, milling, or irrigation purposes, under the laws of the State wherein such national forests are situated . . . ," 16 U.S.C. § 481, it did not intend to preclude the United States from enjoying enforceable appropriative or riparian water rights

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[15] This Court held in *United States v. New Mexico, supra,* that national forests were established primarily for watershed purposes and production of timber. Grazing, recreation, and maintenance of wildlife and wildlife habitat are secondary or corollary purposes.

arising under state law in order to effectuate management objectives. National forests are to be administered for "outdoor recreation, range, timber, watershed, and wildlife and fish purposes." 16 U.S.C. § 528. In order to fulfill its duty to protect wildlife and fisheries on its lands, 16 U.S.C. § 1604(g)(3)(A), 16 U.S.C. § 1604(i), the Forest Service must have water rights, with priority, under state law. *See also* 16 U.S.C. § 1604(g)(3)(B). In order to accomplish its Congressionally prescribed management objectives in California the Forest Service needs to make use of water rights under state law for wildlife watering, fish and wildlife habitat maintenance, recreation, and many other uses.

When it enacted the Organic Administration Act of 1897, *supra*, authorizing the creation of forest reserves, Congress removed lands reserved under the authority of that act from the operation of the Acts of 1866, 1870, and 1877, acquiescing in the acquisition of senior appropriative rights. Consequently, upon a reservation of federal lands as a national forest, the United States withdraws its general consent to the acquisition of appropriative water rights that would have priority over water rights belonging to the United States under state law needed to manage the forests in fulfillment of congressionally authorized secondary management objectives.[16]

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[16] If the Acts of 1866, 1870, and 1877 are viewed as a waiver of the right of the United States to object to the impairment of the water rights on its public lands, the removal of lands from the operation of those Acts necessarily withdraws the waiver. Consequently, upon a withdrawal of the waiver, either by reservation or withdrawal of the lands from the public domain, the exercised water rights of the United States are senior to subsequently acquired water rights. *See* W. Hutchins, *California Law of Water Rights* (1956) at 56, 180.

Once the United States exercises its riparian rights for a reasonable and beneficial use, pursuant to its prescribed duties, such rights have priority as against subsequent appropriators. The United States may therefore assert, claim, and enforce riparian rights under state law in the same manner as private riparian landowners, subject to appropriative rights vested prior to exercise of its riparian rights.

Petitioners argue, Petition at 23, that the United States cannot assert riparian rights for wildlife purposes on national forest lands because the Organic Administration Act of 1897, *supra*, did not contemplate preservation of wildlife in national forests. In *United States v. New Mexico, supra*, this Court held only that federal reserved rights could not be claimed for wildlife watering. As this Court noted in *United States v. New Mexico*, 438 U.S. at 713-714, the Multiple-Use Sustained Yield Act of 1960, 74 Stat. 215, 16 U.S.C. § 528 *et seq.*, broadened the purposes for which national forests had previously been administered. One of these supplemental purposes was for wildlife. *See* p. 11, n.6, *supra*. If the national forests are to be managed for wildlife purposes, water must be made or kept available for wildlife use. Since federal reserved rights are not available to accomplish the wildlife purposes of forest reservations, water rights arising under state law can be properly claimed and enforced by the United States. When this Court noted in *United States v. New Mexico, supra*, that reservation of water for "wildlife protection" purposes "would defeat the very purpose for which Congress did create the National Forest system", 438 U.S. at 711, it did not intend to imply that use by the Forest Service of non-reserved water rights conferred by state law would not be consistent with the supplemental

or secondary purposes for which the forest reservations had been established.

VII. THE PETITIONERS' ARGUMENT THAT RECOGNIZING THE RIPARIAN RIGHTS OF THE UNITED STATES WOULD DISRUPT SETTLED EXPECTATIONS OF APPROPRIATORS UNDER STATE LAW AND OTHERWISE CREATE CHAOS IN CALIFORNIA'S MANAGEMENT OF ITS WATER RIGHTS SYSTEM IS INCORRECT AND MISLEADING.

Petitioners, at page 24 of their Petition, argue that if the United States holds riparian rights, they "attached" in 1848 and could throw into doubt all competing non-federal rights acquired since 1848. However, not only are riparian water rights limited to the doctrine of reasonable and beneficial use as required by Article X, § 2, of the California Constitution, but riparians who do not diligently exercise their rights may lose their priorities of use under California law. Under *In Re Waters of Long Valley Creek Stream System*, 25 Cal.3d 339 at 358-359 (1979), such riparian rights may be assigned a lower priority if they are not diligently exercised. According to *Long Valley*, "[t]he Board may make determinations as to the scope, nature, and priority of the [unexercised riparian] right that it deems reasonably necessary to the promotion of the state's interest in fostering the most reasonable and beneficial use of its scarce water resources." *Id.* at 359. Thus, riparian rights of the federal government may have senior priority, with respect to the reserved or withdrawn lands, only as of the date of actual, or constructive, exercise for a reasonable and beneficial use.

Since the claimed riparian rights arise under state law, the United States would be subject to the constraints set out in *Long Valley, supra*. These constraints would protect the rights of appropriators. The unexercised riparian and littoral water rights of the United States may take priority as late as the date of exercise, unless the Board should determine an earlier priority date.

Petitioners' hyperbole to the contrary, the acknowledgement of riparian water rights as belonging to the United States will not wreak chaos in the state's water law system. The United States' proprietary water rights (asserted for uses related to the secondary purposes of its reservations) can be harmonized with the existing system, especially in view of the rule of *Long Valley*, providing seniority to appropriative water rights as against unexercised riparian rights.

Petitioners also argue that the United States owns in California large tracts of undivided riparian land, for which riparian water rights claims may be made. When California first adopted the law of riparian water rights, many large Mexican land grant ranchos existed.[17] The riparian water rights belonging to these ranchos were successfully integrated with the state's water rights system. Just as the California Supreme Court did not, in *Lux v. Haggin, supra*, limit the California law of riparian rights in consideration of the size of the ranchos that might

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[17] For example, Rancho Ballona was 14,000 acres in size. *Summa Corp. v. Cal. Ex. Rel. State Lands Commission*, 466 U.S. 198, 203, n.2 (1984). "Mexican land grants encompassed over 10 million acres in California and included some of the best land for development." *Id.* at 202.

come to enjoy such rights, so that Court in this case did not hold the riparian rights doctrine inapplicable to federal lands on the basis of the size of the undivided national forests managed and retained by the United States. *State Water Resources Control Board v. United States, supra,* 243 Cal. Rptr. at 890.

Petitioners finally argue that the California Supreme Court decision impairs the State's management authority over private hydroelectric power projects located on federal lands. Petition at 26-27. Private licensees, however, cannot benefit from or use federal property interests in water unless there has been an assignment of such rights. Petitioners point to no statutory provision authorizing federal land management agencies to make such an assignment. Since none exists, the loss of state regulatory control over hydroelectric projects is highly speculative and, at this time, unwarranted.[18]

LAURENS H. SILVER
Sierra Club Legal Defense Fund
2044 Fillmore Street
San Francisco, CA 94115
(415) 567-6100

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[18] Petitioners also suggest that miners and holders of federal grazing permits may also claim "derivative" riparian rights. The riparian right, appurtenant to the federal lands, cannot be assigned or reallocated without appropriate authorization by law. Congress has not authorized the transfer of its reserved or non-reserved water rights to its permittees or licensees conducting activities on its lands.

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No. 87-2010

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

STATE OF CALIFORNIA, et al.,
Petitioners,

VS.

THE UNITED STATES OF AMERICA, et al.,
Respondents.

On Writ of Certiorari to the California Supreme Court

REPLY BRIEF OF PETITIONER STATE OF CALIFORNIA, *ET AL.*

JOHN K. VAN DE KAMP
Attorney General of the
State of California
R. H. CONNETT
Assistant Attorney General
RODERICK E. WALSTON
(Counsel of Record)
CLIFFORD T. LEE
Deputy Attorneys General
California Attorney General's Office
350 McAllister Street, Room 6000
San Francisco, CA 94102
Tel.: (415) 557-3920
Attorneys for Petitioners
State of California, et al.

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

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REPLY BRIEF OF PETITIONER STATE OF CALIFORNIA, *ET AL.*

ARGUMENT

The respondents United States and Sierra Club argue that the United States constitutionally has riparian rights in its lands, and that Congress has not relinquished such rights. These arguments, as we shall explain, are inconsistent with Congress' historic policy of making water available to settlers in order to encourage settlement of the arid West. This congressional policy is reflected both in the Desert Land Act of 1877—which "severed" water from the public lands to encourage settlement—and the Organic Administration Act of 1897, which provided that unreserved water is free for the settlers' needs. Indeed, this congressional policy is reflected in the inherent constitutional limitations on the federal property power. The respondents' argument would turn this congressional policy on its head by creating a new federal "riparian" right that has never been recognized or asserted before. This Court should reaffirm Congress' historic settlement policy by granting the petition and reversing the lower decision.

I

CONGRESS, IN ENACTING THE DESERT LAND ACT AND OTHER LAND LAWS, STATUTORILY RELINQUISHED ANY "RIPARIAN" RIGHTS HELD BY THE UNITED STATES IN ITS LANDS

In our petition, we argued that Congress, in enacting the Desert Land Act and other land laws, relinquished the United States' property rights in unreserved water, thereby relinquishing any federal "riparian" rights. Pet. 8-9, 17-22. The purpose of the relinquishment, we argued, was to make water available to the settlers and encourage disposition of the public domain. *Id.* In reply, the respondents argue that California's position is inconsistent with Congress' traditional policy of requiring the United States to acquire water rights for unreserved purposes under state law. U.S. Br. 11-12; Sierra Br. 7-15. According to their argument, this congressional policy, as applied in riparian states, allows the

United States optionally to comply with state appropriation laws or to assert riparian rights in its lands. *Id.*

Contrary to the respondents' argument, a congressional directive that the United States must acquire water rights under state law does not mean, or even imply, that the United States has riparian rights in its lands. The riparian right is conceptually different than the appropriative right in highly material respects. The riparian right attaches to land and is irrelevant to use, while the appropriative right belongs to the appropriator and is based on actual beneficial use. Pet. 5, 10. The United States' property rights in its lands—including any "riparian" rights—flow from the Property Clause, while the United States' obligation to acquire appropriative rights flows from congressional directives requiring the United States to divert water for specific use in accordance with state law. *Id.* Therefore, when Congress directs the United States to divert water for specific uses in accordance with state law, Congress presumably intends for the United States to proceed as an appropriator rather than a riparian, because the appropriative right—unlike the riparian right—is tailored to the specific *use* contemplated by Congress. Moreover, since federal "riparian" rights exist, if at all, by force of the Property Clause rather than Congress, it is doubtful that Congress can "direct" the United States to possess such rights in any event.

Indeed, when Congress has required the United States to acquire water rights under state law, it has consistently indicated that the United States must proceed as an appropriator rather than a riparian. According to this Court, the Reclamation Act of 1902 requires the United States to "appropriate" water for reclamation purposes in accordance with state law—both in California, which recognizes riparian rights, and in Wyoming, which does not. *California v. United States*, 438 U.S. 645, 665 (1978) (California); *Nebraska v. Wyoming*, 325 U.S. 589, 629 (1945) (Wyoming). Indeed, this Court held that, although California recognizes "common-law riparian-rights doctrine, . . . the United States, on the other hand, by virtue of the Reclamation Act, stands in the position of an upstream *appropriator* for beneficial use." *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 742-743 (1950) (emphasis added). Similarly, this Court has held that

the Organic Administration Act of 1897 requires the United States to proceed "in the same manner as any other public or private *appropriator*" in acquiring water rights for secondary uses in national forests. *United States v. New Mexico*, 438 U.S. 696, 702 (1978) (emphasis added).[1] Thus, Congress has consistently required the United States to comply with state *appropriation* laws in carrying out functions involving water use. The United States' assertion that California's position "prohibits Congress from placing the United States in the same shoes 'as any other public or private appropriator,' " U.S. Br. 9, is both wrong and inexplicable, and confuses the difference between riparian and appropriative rights.

On the other hand, Congress has never indicated, directly or impliedly, that the United States can or should claim *riparian* rights in its lands in carrying out any authorized congressional purpose. To the contrary, Congress' land laws, particularly the Desert Land Act of 1877, "severed" land and water, see *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 158 (1935), thus relinquishing the United States' property rights in water. The purpose of the severance was to make water available to settlers in order to encourage settlement, see Pet. 8-9, 18-20, and this purpose is not consistent with a federal riparian right, which would have limited such availability and discouraged settlement. Moreover, since the United States already has a federal right to reserve water for primary reservation uses, and can acquire additional water rights under state appropriation laws, a federal "riparian" right is unnecessary to serve any federal interest not adequately protected under existing water law doctrines.[2]

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[1] The respondents argue that the Court in *New Mexico* meant only that the United States must proceed as an "appropriator" in states, such as New Mexico, that exclusively recognize appropriative rights. U.S. Br. 10 n. 9; Sierra Br. 17. In the cited reference, however, the Court was referring to Congress' general policy of deferring to state appropriation laws, not to New Mexico's special appropriative system. See *New Mexico*, 438 U.S. at 702.

[2] Further, as explained in the petition, recognition of a federal "riparian" right would impair the states' ability to plan and manage the allocation of their water resources, and would create uncertainty with

The respondents make several arguments to support their contention that the Desert Land Act did not terminate the United States' "riparian" rights. First, they argue that the sole purpose of the severance was to require deference to state water law; *ergo*, since California recognizes riparian rights, the United States has riparian rights in California. U.S. Br. 9-10, 11-12; Sierra Br. 7-10. To be sure, this Court in *California Oregon Power* held that the Desert Land Act reaffirmed the states' constitutional authority to adopt and administer their own water law systems, and therefore that the states have the right to adopt either the appropriation doctrine or the riparian doctrine; "Congress cannot enforce either rule upon any state." *California Oregon Power*, 295 U.S. at 163-164, quoting from *Kansas v. Colorado*, 206 U.S. 46, 94 (1907). As explained above, however, the Desert Land Act, beyond simply deferring to state water law, meant to make water available to the settlers in order to encourage settlement of the West. This settlement purpose is not consistent with a federal "riparian" right, for the settlers could not have obtained the water if the United States had retained its sovereign rights in the water.

Therefore, although Congress reaffirmed the states' constitutional authority to adopt their own water laws, it also precluded the United States itself from asserting riparian rights in its lands. Although Congress did not "federalize" the doctrine of appropriation, as the Sierra Club properly notes, Sierra Br. 9 n. 5, Congress did adopt a national policy precluding the United States from asserting water rights simply on the basis of its sovereign land ownership. Under this national policy, the United States must proceed as an appropriator rather than a riparian in acquiring water rights under state law. This national policy is reflected in Congress' reclamation and forest statutes, described above, requiring the United States to proceed as an "appropriator" under state law.

Second, the respondents argue that the Desert Land Act, although severing land and water, does not apply on federal

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respect to existing appropriative and riparian rights. Pet. 23-27. The amici briefs of the Association of California Water Agencies, *et al.*, and the Friant Water Users Authority describe the consequences of such uncertainty in substantial detail.

reserved lands, citing this Court's decisions in *Federal Power Comm'n v. Oregon (Pelton Dam)*, 349 U.S. 435, 448 (1955), and *Cappaert v. United States*, 426 U.S. 128, 143-144 (1976). U.S. Br. 12; Sierra Br. 2, 10-11. In *Pelton Dam* and *Cappaert*, the States of Oregon and Nevada respectively argued that the Desert Land Act, by severing land and water, authorized state regulation of federal water uses on reserved lands. This Court rejected the States' argument, holding that the Desert Land Act does not apply on reserved lands. Neither *Pelton Dam* nor *Cappaert* considered whether the Desert Land Act affected any "riparian" rights held by the United States in its lands, which is the question presented here.

This Court's view in *Pelton Dam* and *Cappaert* that the Desert Land Act does not apply on reserved lands is inconsistent with this Court's recent decision in *United States v. New Mexico, supra*, 438 U.S. 696, which held that state appropriation laws apply on *reserved* lands with respect to federal secondary uses. Pet. 20-21. After *New Mexico*, the proper analysis is that the Desert Land Act creates an inference that state appropriation laws apply to secondary uses on reserved lands, but not to primary uses. The respondents, in reply, assert that *New Mexico* did not consider whether the United States has riparian rights in its lands. U.S. Br. 12 n. 10; Sierra Br. 11 n. 6.[3] This assertion, although correct, does not respond to our argument that *New Mexico* overturned, *sub silentio*, the analysis in *Pelton Dam* and *Cappaert* that the Desert Land Act does not apply on reserved lands. Moreover, if the Desert Land Act does not apply on reserved lands, there is no basis for the respondents' argument that the

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[3] The Sierra Club erroneously asserts that this Court in *New Mexico* "did not even mention those Acts [the Desert Land Act and Mining Act] as the theoretical underpinning of its ruling . . . " Sierra Br. 11 n. 6. To the contrary, *New Mexico* specifically referred to a Senate committee report that, in the Court's words, "list[ed] 37 statutes in which Congress has expressly recognized the importance of deferring to state water law, from *the Mining Act of 1866* . . . to the Act of Aug. 28, 1958, . . . " 438 U.S. at 702 n. 5 (emphasis added). As noted in the petition, the 37 statutes listed in the Senate report included the Desert Land Act and the Mining Acts of 1866 and 1870. Pet. 21.

United States has riparian rights under *state* law on the reserved lands involved here. Thus, the respondents' argument is internally inconsistent in any event.

Third, the respondents argue that this Court in *California Oregon Power*, in holding that the Desert Land Act severed land and water, "meant only that when federal lands were granted to private individuals for agricultural or homesteading purposes, no federal water rights were transferred." Sierra Br. 2. In effect, the respondents argue that Congress did not *sever* the United States' property rights in water, but instead precluded the *transfer* of such rights to its grantees. This argument would transform the historic severance principle into a modest restriction against transferability. This argument is inconsistent with the purpose of the severance enunciated in *California Oregon Power*, which was to relinquish federal property rights in water in order to make water available to the settlers. This purpose is not served if the United States retains its own property rights in water, whether or not it transfers such rights to grantees. Therefore, the severance applied to the United States' own rights, not just those of its grantees. The reason that grantees do not obtain riparian rights as part of their grants is not that the United States has not conveyed such rights, but because the United States has no such rights to convey. The respondents' transferability argument would transmute and modify the historic severance principle enunciated in *Calfornia Oregon Power*.

II

THE ORGANIC ADMINISTRATION ACT OF 1897 PRECLUDES THE UNITED STATES FROM ASSERTING RIPARIAN RIGHTS FOR WILDLIFE PURPOSES ON NATIONAL FOREST LANDS

In *United States v. New Mexico, supra*, 438 U.S. 696, this Court held that the Organic Administration Act of 1897 precludes the United States from reserving water for wildlife uses on national forest lands, reasoning that such a reservation would defeat the Act's purpose in making water available to the settlers. In our petition, we argued that *New Mexico* supports the view that

the United States cannot assert *riparian* rights for the same wildlife purposes, since such rights would equally defeat the Act's purpose in making water available to the settlers. Pet. 9, 22-23.

The respondents argue that *New Mexico* held only that the United States must acquire water rights for secondary reservation purposes under state law, and that the United States "is no less entitled to obtain that water if it chooses to invoke its state-recognized riparian rights rather than appropriative rights." U.S. Br. 13; see Sierra Br. 23-27. The reasoning of *New Mexico*, however, is that the United States cannot assert *any* property rights in water for wildlife purposes that would diminish availability of water to the settlers. Thus, although *New Mexico* considered the question in a reserved rights context, its reasoning applies equally to the riparian context involved here.

The United States argues that Congress' policy of making water available to settlers would be defeated in any event if, as we argue, the United States can acquire water rights for wildlife purposes under state *appropriation* laws. U.S. Br. 13-14. To the contrary, Congress meant only to preclude the United States from asserting water rights simply on the basis of its sovereign land ownership, and did not mean to preclude the states from balancing federal needs against the settlers' needs under their appropriation laws, in order to achieve maximum beneficial uses of the state's sparse water supply. As we have noted, the appropriation doctrine, unlike the riparian doctrine, allows the state to weigh a proposed use against competing uses in order to determine whether the right should be granted. Pet. 10, 26. Congress thus preserved the states' authority to balance federal secondary needs against competing needs under their appropriation laws, and only precluded the United States from circumventing the appropriation process by asserting rights on the basis of its sovereign land ownership.

III

THE UNITED STATES CONSTITUTIONALLY LACKS RIPARIAN RIGHTS IN ITS LANDS

In our petition, we argued that the Property Clause occupies the field of the United States' property rights in its lands, and therefore the United States does not have riparian rights held by ordinary landowners under state common law. Pet. 5-8, 12-17. The respondents argue that the United States has both proprietary and sovereign rights in its lands, citing dictum to that effect in *Kleppe v. New Mexico*, 426 U.S. 529, 540 (1976). U.S. Br. 9-10; Sierra Br. 21. As noted in the petition, the United States does have both proprietary and sovereign rights in its lands, but such rights arise under the Property Clause rather than state common law. Pet. 13-14. Moreover, *Kleppe* held only that Congress has *constitutional* power to regulate wild horses and burros on public lands, and did not consider whether the United States has ordinary property rights under state law.

The respondents also argue that the United States possesses ordinary property rights under the *Clearfield Trust* doctrine. U.S. Br. 9; Sierra Br. 19-20. Under this doctrine, the federal courts may "borrow" state law to develop a uniform rule of federal common law, assuming that a constitutional or statutory interstice exists and that state law is congruent with federal policy. See, *e.g.*, *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943); *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 592-595 (1973). Since federal law already authorizes the United States to reserve water for use on its lands, there is no constitutional or statutory interstice that justifies the "borrowing" of state riparian laws. Moreover, since the Desert Land Act and Organic Administration Act were intended to make water available to settlers in order to encourage settlement, the "borrowing" of state riparian laws—which would limit availability of water to the settlers—is not congruent with congressional policy. Finally, the *Clearfield Trust* doctrine establishes a uniform body of federal law, and thus does not authorize the United States to assert riparian rights under *state* law. Cf. *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 457 (1957) ("Any state law applied . . . will be absorbed as federal law and will not be an independent source

of private rights"). For these reasons, the *Clearfield Trust* doctrine does not apply here.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court grant the petition for writ of certiorari.

Respectfully submitted,

JOHN K. VAN DE KAMP
Attorney General of the
State of California

R. H. CONNETT
Assistant Attorney General

RODERICK E. WALSTON
CLIFFORD T. LEE
Deputy Attorneys General
Attorneys for Petitioners
State of California, et al.